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The recent decision of the Supreme Court of Wisconsin in the case of State v. Duket, calls attention to a serious defect in the law of that State, which may be found to exist in other States. The constitution of that State provides that the legislature shall not grant any divorce. It was, nevertheless, held that a statute of that State, providing that a sentence of imprisonment for life shall dissolve the marriage of the person sentenced, without any judgment of divorce or other legal process, is not in conflict with the constitution, and operates to absolutely dissolve the marriage when either party is sentenced for life. The action in the case mentioned was a prosecution for adultery, the gravamen of the alleged offense being that the defendant had married a woman whose husband had been sentenced to imprisonment for life, the marriage being contracted a few days before the reversal of the husband's conviction on appeal, although defendant was aware that proceedings for a new trial were then pending, and that defendant continued to cohabit with said woman after a reversal of the former husband's sentence. The court, in deciding the main question, says that the intent of the constitutional provision that the legislature shall not "grant any divorce" was not to restrict the legislature in the enactment of appropriate general laws, but the mischief sought to be suppressed was the granting of divorces by the legislature in special instances, by special laws—in view of the ease and facility with which such divorces might be procured, a power likely to be capriciously, improvidently and sometimes unjustly exercised.

The court was, however, compelled to go further and hold that the effect of the statute, as dissolving a marriage on the sentence of either party to life imprisonment, is not affected by the subsequent reversal of the sentence. This result is logical, sound and supported by authority. The reversal of the sentence cannot operate to restore the parties to their former matrimonial relations, as in the case of reversal of a valid judgment of divorce for mere error in its rendition. In States where sentence to imprisonment in the State prison for a term of years is made ground for an action of divorce, it has been held that as soon as the sentence has been given the right of the other party to apply for a divorce is complete (Handy v. Handy, 134 Mass. 394), and that such right is not suspended by a bill of exceptions, on which the conviction and sentence may be reversed (Cone v. Cone, 58 N. H. 152). But the law should be amended so as to work a dissolution of the marital relation only upon the final affirmance of a sentence, or the expiration of the time to appeal. Indeed, this case will suggest forcibly the necessity for an amendment of the law so as to make a sentence of imprisonment ground merely for divorce. There is no reason why an innocent spouse should have her marriage dissolved if she prefers that the matrimonial *status* should continue.

The decision of the United States Court of Appeals in the South Carolina registration case, reversing Judge Goff's ruling and dissolving the injunction granted by him, to which we called attention in a recent issue (40 Cent. L. J. 487), is based on the general ground that Federal courts cannot pass upon abstract political questions. Some State courts of highest resort pronounce upon the constitutionality of laws as an abstract proposition, but the United States Supreme Court never does. It is essentially a "case" court. Somebody must show that he is injured or imperilled, either in his property or civil rights by any given legislation before the court will so much as take up the question of its constitutionality.

The bill of complaint in the case mentioned challenged the constitutionality of certain laws of South Carolina, but the question was raised on the threshold whether the case made was one of equitable cognizance. Chief Justice Fuller, who delivered an opinion, said that it was well settled that a court of chancery is conversant only with questions of property and the maintenance of civil rights. The court has no jurisdiction in matters of a political nature, or to interfere with the duties of any department of government except under special circumstances and

when necessary for the protection of rights of property, or in matters merely criminal or merely informal, which do not affect any right of property. Here there is a plain and adequate remedy at law, nor does illegality alone afford ground for equitable interference. Tested by these principles the bill of complaint cannot be maintained, for it asserts no threatened infringement of the rights of property or civil rights, and no adequate ground for equity interposition.

The merits of the question involved are gone into more at length in an opinion read by Judge Hughes, who says that the original bill contains no allegation that the provisions of law complained of were devised against the complainant or those for whom he sues on account of their race, color or previous condition of servitude, and that there are no averments in the bill which show that the case falls within the purview of the fifteenth amendment of the constitution of the United States. The bill charges that the effect of the provisions of the registration acts complained of is to give unequal facilities of registration to different classes of citizens, but it does not point out how this is so. It confounds privilege with protection. The bill has no reference to a Federal election in setting out complainant's case. The gravamen of the bill contemplates only a State election to be held for members of the State convention to convene in August next, and it is not shown that any federal election is to be held in the State of South Carolina before November, 1895.

The judge added that while the right of the judiciary to pass upon the constitutionality of the laws is undoubted, it has that right simply as an incident to its protection of private rights. It has not that right as a mere means of settling abstract questions, and even in the enforcement of private rights it has not the power to interfere with the discretion vested in the other departments or with the exercise of the political powers of those departments. He declared it to be a dangerous encroachment upon the prerogatives of the other departments of government if the judiciary be intrusted to exercise the power of interfering with the holding of an election in a State. In case that is so, a single citizen in each county (and in the case at bar he is not even a qualified voter) can enjoin an election throughout the entire State, and thus deprive thousands of their rights to vote, and if a court has power to do this free elections are at an end. If elections are improperly held, he said, there are appropriate means provided by law for questioning their results and remedying wrongs without the exercise of this dangerous power by the courts.

NOTES OF RECENT DECISIONS.

FEDERAL OFFENSE—POSTAL LAWS—MAILING NON-MAILABLE MATTER—DECOY LETTERS.—In Grim v. United States, 15 S. C. Rep. 470, decided by the United States Supreme Court, which was a federal prosecution under Sec. 3893, U. S. Rev. Stat., as amended by Act Sept. 26, 1888, ch. 1039, for mailing non-mailable matter, one ground upon which the conviction below was attacked was because the letters of defendant were deposited in the mails at the instance of the government, and through the solicitation of one of its officers; that they were directed and mailed to fictitious persons; that no intent can be imputed to defendant to convey information to other than the persons named in the letters sent by him; and that as they were fictitious persons there could in law be no intent to give information to any one. The court, however, overruled the objection saying:

There has been much discussion as to the relations of detectives to crime, and counsel for defendant relies upon the cases of U. S. v. Whittier, 5 Dill. 35, Fed. Cas. No. 16,688; U. S. v. Matthews, 36 Fed. Rep. 891; U. S. v. Adams, 59 Fed. Rep. 674; Saunders v. People, 38 Mich. 218,—in support of the contention that no conviction can be sustained under the facts in this case.

It is unnecessary to review these cases, and it is enough to say that we do not think they warrant the contention of counsel. It does not appear that it was the purpose of the post-office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a government official,—a detective, he may be called,—do not of themselves constitute a defense to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official. The authorities in support of this proposition are many and well considered. Among others reference may be made to the cases of Bates v. U. S., 10 Fed. Rep. 92, and

the authorities collected in a note of Mr. Wharton, on page 97; U. S. v. Moore, 19 Fed. Rep. 39; U. S. v. Wight, 38 Fed. Rep. 106, in which the opinion was delivered by Mr. Justice Brown, then district judge, and concurred in by Mr. Justice Jackson, then circuit judge; U. S. v. Dorsey, 40 Fed. Rep. 752; Com. v. Baker, 155 Mass. 287, 29 N. E. Rep. 512, in which the court held that one who goes to a house alleged to be kept for illegal gaming, and engages in such gaming himself, for the express purpose of appearing as a witness for the government against the proprietor, is not an accomplice, and the case is not subject to the rule that no conviction should be had on the uncorroborated testimony of an accomplice; People v. Noelke, 94 N. Y. 137, in which the same doctrine was laid down as to the purchaser of a lottery ticket, who purchased for the purpose of detecting and punishing the vendor; State v. Jansen, 22 Kan. 498, in which the court, citing several authorities, discusses at some length the question as to the extent to which participation by a detective affects the liability of a defendant for a crime committed by the two jointly. State v. Stickney, 53 Kan. 808, 36 Pac. Rep. 714. But it is unnecessary to multiply authorities. The law was actually violated by the defendant; he placed letters in the post-office which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a government detective in no manner detracts from his guilt.

ANIMAL—INJURIES BY DOMESTIC ANIMAL—TENANTS IN COMMON.—In Morgan v. Hudnell, 40 N. E. Rep. 716, the Supreme Court of Ohio decides that the owner of a domestic animal is not in general liable for an injury committed by such animal while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity. But if the animal breaks into the close of another, and there damages the real or personal property of the one in possession, the owner of the trespassing animal is liable, without reference to whether or not such animal was vicious, and without reference to whether such propensity was known to the owner, and that one tenant in common of a pasture field may maintain an action against the owner of a domestic animal which breaks into the field and injures the live stock of such tenant rightfully grazing therein, and the other tenants are not necessary parties to such action. The following is from the opinion of the court:

Undoubtedly, it is settled law that the owner of a domestic animal is not, in general, liable for an injury committed by such animal while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity. But we regard it as equally well settled that if the animal breaks into the close of another, and there damages the real or personal property of one in possession, the owner of the trespassing animal is liable, without reference to whether such animal was vicious, and without reference to whether such propensity was known to the owner, for the law holds a man answerable, not only for his own trespass, but for that of his domestic animal. The natural and well known propensity of horses, as well as other cattle, is to rove, and the owner is bound to confine them on his own land; so that if they escape, and do mischief on the land of another, under circumstances where the other is not at fault, the owner ought to be liable. Beckwith v. Shordike, 4 Borrows, 2092; Angus v. Radin, 5 N. J. Law, 815; Dolph v. Ferris, 7 Watts & S. 367; 3 Bl. Comm. 211. The question, then, in this case, is, whether or not Hudnell was in possession of the pasture field, in such sense as to authorize him to maintain the action. It is the duty of this court to give such construction to the record as will sustain the judgment of the court below, if it can be reasonably done. Looking to the bill of exceptions, we find that the plaintiff "had the right to keep the horse in question in Houser's pasture field, on pasture," and "paid a certain price per month for such right;" that is, Hudnell, the plaintiff, was keeping the horse there. Houser, the owner of the land, was not keeping the horse there. It does not appear that he was keeping any animal there. Other persons, who had like right with plaintiff, had their horses in the same field, on pasture. It does not appear that Houser reserved any right to use the field for his own stock, nor for the stock of others. Indeed, the circumstances are consistent with the idea that Houser had, for the time these contracts remainded in force, given up the possession of those who had thus hired the pasture. In this view, they were, then, the owners of the growing herbage. The rule that tenants so in possession may maintain trespass against even the owner of the fee seems to rest on reason and abundant authority. Crosby v. Wadsworth, 6 East, 602; Tompkinson v. Russell, 9 Price, 287; Clap v. Draper, 4 Mass. 266; 1 Add. Torts, 371, 372. It would follow from this that, had damage to the herbage been the ground of complaint, the tenants might have maintained a joint action for trespass.

If the conclusion just stated is justified—and we think it is—the only question remaining is as to the right of one of several tenants in possession, holding by separate contracts, to maintain an action in trespass, where the damage for which he seeks to recover is to his own individual property rightfully in the close, by virtue of his rental contract. That the damage is to personalty will not, according to the authorities, stand in the way of a recovery. True, such damage is treated by many authorities as an incident, and in the nature of aggravation. But this distinction seems to have arisen from a desire to preserve the common law form of action, and at the same time not deny the injured party a remedy. The old action for trespass *quare clausum fregit* was strictly an action for damages to the land following an unlawful entry, and hence could not be resorted to for the purpose of a recovery for damages to personalty only. But forms of action not being important in this State, since the adoption of the Code, we need not be embarrassed by any such distinction. The question in every case is not what is the proper form of action, but, has the party a right of action? Upon this phase of the inquiry we do not find authorities. But, upon princi-

ple, why should not one of several tenants in common have such an action? Had he been in exclusive possession, no doubt would exist. Why should the mere fact that others are interested in the growing herbage bar a recovery? They are not concerned in the special damage suffered by plaintiff, and holding, not by virtue of a joint contract, but by separate several contracts, are not necessary or proper parties. It cannot prejudice the defendant that others having the same right of pasture do not join in the action, for they have no concern with it. If the claim were for damage to the herbage, the case would be different, inasmuch as it might be urged that the defendant's entire liability should be determined in one action, and hence all should be parties. In Virginia and Vermont it is held that even in that case one alone may maintain the action, though it appears that the trend of authority is the other way. Probably, the latter view would prevail in this State. And yet, if it were attempted to recover in one action for damages to the real estate suffered by all, and for damages to the personalty of one alone, a vexed question of misjoinder would arrive, because all the parties would not be interested in each ground of action. To hold, therefore, that one tenant could have no standing to recover for damages to his personalty, save by joining with him the other tenants, is practically to refuse him any relief whatever. And this would, in effect, be to say that the law will take cognizance of a claim for damage to real estate, though it may amount only to a few cents, and refuse a hearing to a claim for destruction of personal property, under like facts, which may reach hundreds of dollars. It would be to say further that a party suffering injury to his personalty by an animal trespassing upon premises of which he has sole possession may be made whole, but if it happens that the possession is shared by others he is without remedy. Such a result would cast discredit on the power of the law to work out justice. To deny the right of the injured party to maintain action for damage to his separate personalty upon any of the grounds referred to would, we think, be to interpose a technicality for the purpose of defeating justice. It is the duty of courts, as we understand it, to override mere technicalities, where they stand in the way of doing justice between man and man. Stated in brief, the case is this: The plaintiff's horse was in a close where the owner, having rightful enjoyment, had a right to keep him. He had a right in the field. The defendant's horse, by breaking the fence which his landlord was bound to maintain, became a trespasser, and, while thus unlawfully invading the close as a trespassing animal, inflicted the damage to plaintiff's property. For such wrong we think the law should, and does, afford a remedy.

INSURANCE—WAIVER OF CONDITION—PREMIUM NOTE.—It is held by the Supreme Court of Nebraska in Phenix Ins. Co. v. Rollins, 63 N. W. Rep. 46, that a clause providing that an insurance policy shall be suspended during the time the premium note shall remain unpaid after maturity is for the benefit of the company, and may be waived by the insurer. In that case a fire insurance policy for the term of five years at a gross premium for the entire time, the insured giving his note for such premium, due in one year from date, contained a stipulation to the effect that the failure by the insured to pay the premium note, when due, suspended the policy during such default, but that a subsequent payment of the premium in full revived the policy for the remainder of the term. The defendant made default in the payment of such note, and in an action thereon it was held that the company was entitled to recover the full amount of the note. Norval, C. J., says in part.

If we correctly understand the argument of counsel for defendant, it amounts to this: That by virtue of the foregoing provision contained in the policy and the stipulation in the note, the insurance terminated upon default being made in the payment of the premium note, and the insurance having ceased in favor of the plaintiff at the maturity of the note, the premium likewise ceased to accrue against the defendant. This is, doubtless, the view adopted by the trial court. If this is the proper construction to be placed upon the clauses quoted above, when read in the light of the facts in the case, the decision is right, otherwise the judgment must be reversed. By the terms of the contract the policy was voidable upon the defendant making default, but voidable merely at the option of the company. The condition declared the insurance suspended during default of payment of the premium note. The provision was inserted in the policy for the sole benefit of the insurer, and not the insured, and is valid and binding. This stipulation could be waived by the company. This was decided in Insurance Co. v. Bachelder, 32 Neb. 490, 49 N. W. Rep. 217, and the same doctrine is held by other courts. Zinck v. Insurance Co., 60 Iowa, 266, 14 N. W. Rep. 792; Mehurin v. Stone, 37 Ohio St. 58; Palmer v. Sawyer, 114 Mass. 13. It appears that this defendant has retained the policy, and never offered to surrender it, and that plaintiff has at all times since the maturity of the note endeavored to enforce the collection of the note, and brought this action for that purpose. As to what acts have been construed as a waiver of conditions in a policy similar to the one in this case, see Johnson v. Insurance Co., 79 Ky. 403; Insurance Co. v. Woods (Ind. App.) 37 N. E. Rep. 180; Insurance Co. v. Perkey (Tex. Civ. App.), 24 S. W. Rep. 1080; Brady v. Insurance Co. (Com. Pl. N. Y.) 29 N. Y. Supp. 44; Insurance Co. v. Scheidle, 18 Neb. 495, 25 N. W. Rep. 620; Insurance Co. Christiensen, 29 Neb. 572, 45 N. W. Rep. 924; Insurance Co. v. Dungan, 37 Neb. 470, 55 N. W. Rep. 1069. In the last case the stipulations in the premium note and policy were the same as in the case before us. After the maturity of the note, a payment was made thereon, and the note was left with an agent for collection. Before the note had been fully paid, the property covered by the policy was destroyed by fire. In an action to recover for the loss it was held (we quote from the syllabus) "that the policy was voidable only at the election of the insurance company, and that by receiving and retaining the part payment after the default, and retaining the note for collection, it waived the right to insist upon a forfeiture thereof." Whether, had a loss occurred after the maturity of the note in question, and an action had been brought to recover upon the policy, the company could have interposed as a defense that the note had not been paid, it is unnecessary to now decide, as the determi-

nation of such question adversely to the company would not defeat its action upon the note. As elsewhere stated, the clause contained in the policy was intended for the protection of the company merely. To permit the defendant to insist that the contract of insurance terminated by his own failure to pay the note would allow the insured to take advantage of his own laches or wrong, which the law will not sanction. The defendant contracted to pay the plaintiff $40 for carring the risk on his property for the full period of five years, with the contingency, thoroughly understood at the time, that the insurance might be suspended by the failure of the insured to pay the premium when due. There is no stipulation releasing the defendant from the payment of any portion of the note in case he should fail to comply with the contract. The company has furnished and the defendant has receivd all the contract required. The insured could have continued the policy in force for the five years, had he chosen to do so, by paying the note according to its terms. The company acquired a present vested right in the premium as an entirety immediately upon the execution and delivery of the note and policy. The failure of the assured to pay the note did not render the policy absolutely void, but merely suspended it during the continuancy of the default. A voluntary or enforced payment of the premium would have the effect to revive the policy for the remainder of the original term of the risk. We are fully satisfied that plaintiff is not restricted to a recovery of such part of the premium as equaled the customary short rates for one year's insurance, but it was entitled to collect the full amount of the note. The construction we have placed upon the stipulations of the parties is sustained by the following authorities: Insurance Co. v. Klink, 65 Mo. 78; Robinson v. Insurance Co., 51 Ark. 441, 11 S. W. Rep. 686; Insurance Co. v. Henley, 60 Ind. 515; Insurance Co. v. Coleman (Dak.), 43 N. W. Rep. 693; Insurance Co. v. Boykin, 25 S. C. 323; Insurance Co. v. Hoffman, *Id.* 327; Insurance Co. v. Olson (Minn.), 44 N. W. Rep. 672. The defendant relies upon three cases to justify his position, namely: Yost v. Insurance Co., 39 Mich. 531; Insurance Co. v. Stoy, 41 Mich. 385, 1 N. W. Rep. 877; Matthews v. Insurance Co., 40 Ohio St. 135. These cases are not like the one under consideration. In each a note payable in annual installments was given for the premium, each installment being a premium for a distinct year's insurance. The policy stipulated that, if any installment was not paid at maturity, the policy should be null and void until payment was made. It was held that the insurance was not for a term of years, but as an annual insurance, renewable each year for a period not exceeding such term, the policy was void so long as there was any default in the payment of any installment, and that no recovery could be had for successive installments of the premium. In the case before us the defendant agreed to pay a gross sum as premium for the carring of the risk for the full period of five years, subject to the provisions of the policy. In the Ohio case two of the judges dissented; and the Michigan court, in Williams v. Insurance Co., 19 Mich. 451, and Cauffield v. Insurance Co., 47 Mich. 447, 11 N. W. Rep. 264, in continuing an insurance policy purporting to be for five years, containing a stipulation that upon the non-payment at maturity of any installment note given for the premium the policy should be void until revived, and the whole amount of installments remaining unpaid should be considered earned, decided that the insured was liable upon the installment notes, thereby recognizing the law as we have stated it to be. The findings and judgment of the District Court are reversed, and the cause remanded.

MECHANIC'S LIEN — COUNTERCLAIM.—The Appellate Court of Indiana in Reichart v. Krass, 40 N. E. Rep. 716, decided that in an action to foreclose a mechanic's lien, if defendant sets up a counterclaim growing out of the same transaction, the whole controversy is "drawn into equity," and defendant is not entitled to a trial by jury. The counterclaim was for damages, arising out of alleged inferior work and the use of unsuitable materials in the construction of the building for which the mechanic's lien was filed. On the facts the action is substantially analogous to the recent case of Deeves v. Metropolitan Realty Co., 141 N. Y. 587, noticed in the *New York Law Journal* June 11, 1895. The Indiana court disposed of the question somewhat dogmatically, probably having principally in mind the great practical inconvenience and possible oppression of allowing separate trials before different tribunals of the issue raised by the complaint and the counterclaim respectively. The opinion concluded as follows:

The grievances complained of in the counterclaim grew out of the same contract and transactions which are the basis of the complaint. The defendant may, under such circumstances, elect whether he will use the injuries he has sustained as a defense by way of recoupment, or he may use it as a counterclaim or as an independent cause of action. Brower v. Nellis, 6 Ind. App. 325, 33 N. E. Rep. 672; Aultman v. Richardson (Ind. App.) 38 N. E. Rep. 532; Aultman v. Forgy (Ind. App.) 36 N. E. Rep. 939. If he use the matter in defense by way of recoupment, he can have no judgment over for any excess of damages. If he use it as a counterclaim, he may have judgment over for the excess found due him. But in either event the plaintiff's right to a recovery will be defeated. As the plaintiff's right to a recovery in his equitable action is liable to be defeated by the counterclaim, the whole controversy is drawn into equity, and is triable by the court without the aid of a jury. Towns v. Smith, 115 Ind. 480, 16 N. E. Rep. 811; Martin v. Martin, 118 Ind. 227, 20 N. E. Rep. 763. It is true that the appellant might have elected to use the breach of the contract set out in his counterclaim as an independent cause of action, and have had the issues thereon tried by a jury; but, as he voluntarily brought it into an equitable proceeding, he will be bound to submit to the rules that govern in such proceedings.

INDEPENDENT CONTRACTORS AND THE LIABILITY FOR THEIR NEGLIGENCE. — DANGEROUS PREMISES.

It is a familiar rule of law which need not here be supported by authorities, that every owner of property is bound to make such use of the same and keep it in such condition, that the safety or property of other persons, lawfully on or near his premises may not be endangered.[1] To this duty imposed upon the owner by law mere trespassers and licensees cannot appeal. They assume the risk and dangers of injury, and in general have no remedy against the owner for injuries.[2] But as to all persons by the owner's invitation, express or implied, on his premises, he is bound to use ordinary care in keeping his premises in a safe condition;[3] and he owes this duty to his servants,[4] unless they voluntarily assume positions of danger the hazards of which they understand and appreciate. For injuries from perils incident to such positions they cannot recover.[5]

Sec. 1. *Who are Independent Contractors?* —The question whether the relation between the employer and persons doing work for him is that of master and servant or that of independent contractor, must be solved upon the facts of each case and the intention of the parties; and in general it may be said that one rendering service in the course of an occupation representing the will of the employer only as to the result, but not as to the means of performance and the detail of the work by which it is accomplished, is an independent contractor.[6] The tests are: direction of and control over details of the work; selection, discharge, control over the contractor's servants.[7] For the absence of the liability of the employer for the acts of the contractor and his servants, the absence of control is the principal reason.[8] The right of selection is the basis of the responsibility of a master for the acts and omissions of his servants. No one can be held responsible who has not the right to chose the agent from whose act an injury flows.[9] In general, therefore, the employer is not liable for injuries caused by negligence of independent contractors or their servants.[10] While on the

[1] Ray. Negl. Imp. Duties, Ch. III, p. 18*ff*; 26 L. R. A. 686.

[2] Gibson v. Leonard, 143 Ill. 182; Pelton v. Schmidt, 56 N. W. Rep. 689; Billows v. Moors, 37 N. E. Rep. 750; Faris v. Hoberg, 134 Ind. 269; Benson v. Traction Co., 77 Md. 535; Chapin v. Walsh, 37 Ill. App. 526.

[3] Powers v. Harlow, 53 Mich. 507; Pelton v. Schmidt, 97 Mich. 231; Emry v. Minn. Ind. Expr., 57 N. W. Rep. 1132; Howe v. Ohmart, 26 L. R. A. 524, 33 N. E. Rep. 466.

[4] Haley v. W. Transit Co., 76 Wis. 344; Johnson v. First Nat'l Bank, 79 Wis. 414; Sadowiski v. Mich. Car Co., 84 Mich. 100; Mollie G. Co. v. Sharp, 38 Pac. Rep. 850; Nadau v. W. R. L. Co., 76 Wis. 120; Propson v. Leather, 80 Wis. 608; Caroll v. Williston, 44 Minn. 287; Chic. E. I. Ry. v. Knieriem, 39 N. E. Rep. 324.

[5] Robinson v. Manh. Ry., 5 Wis. 209; Gulf, C. & S. F. Ry. v. Jackson, 65 Fed. Rep. 48; Goddard v. McIntosh, 37 N. E. Rep. 169; Reilley v. Parker, 31 N. Y. S. 1014.

[6] Wray v. Evans, 20 Pa. St. 102; Harrison v. Collins, 86 Pa. St. 153; Wabash Ry. v. Farver, 111 Ind. 195; 14 Am. & Eng. Enc. of Law, p. 829; Edmunds v. Pittsburg Ry., 111 Pa. St. 316; Knowlton v. Hoit, 30 Atl. Rep. 346; 23 Cent. L. J. 249.

[7] Boswell v. Laird, 8 Cal. 469; Linneham v. Rollins, 137 Mass. 123; Hexamer v. Webb, 101 N. Y. 377; Hughes v. Ry., 39 Ohio St. 461; Knowlton v. Hoit, *supra*; Riedel v. Moran & Co., 61 N. W. Rep. 509; Martin v. Tribune, 30 Hun, 391; Hackett v. W. U. T. Co., 80 Wis. 187; Long v. Moon, 17 S. W. Rep. 810; Bennett v. Truebody, 66 Cal. 509; Speed v. Ry., 71 Mo. 303; Pierrespont v. Loveless, 72 N. Y. 507; 14 Am. & Enc. of Law, p. 830; R. R. v. Norwood, 62 Miss. 565; Burmeister v. R. R., 47 N. Y. S. C. 26; 423 Am. L. Reg. (N. S.) 101, and cases cited; Cunningham v. Int. Ry., 51 Tex. 503; Waters v. Greenleaf J. L. Co., 20 S. E. Rep. 718; Larson v. Metr. St. Ry., 19 S. W. Rep. 416; Harris v. McNamara, 12 South. Rep. 103; Charlesbois v. Gogebic, 51 N. W. Rep. 812; Geer v. Darrow, 61 Conn. 230; Wabash Ry. v. Farver, 111 Ind. 195; Ferguson v. Hubbell, 97 N. Y. 507; Harding v. Boston, 39 N. E. Rep. 411.

[8] Fuller v. Cit. N. B., 15 Fed. Rep. 875; Samuelson v. Cleveland Co., 49 Mich. 114.

[9] Boswell v. Laird, 8 Cal. 469; Brown v. Smith, 86 Ga. 274; Bernauer v. Hartman Co., 33 Ill. App. 491; Butler v. Townsend, 26 N. E. Rep. 1017; Jessup v. Sloneker, 21 Atl. Rep. 988; Charlock v. Freel, 125 N. Y. 357.

[10] Casement v. Brown, 148 U. S. 615; Hale v. Johnson, 80 Ill. 185; Murrie v. Currie, L. R. 6 C. P. 24; Harris v. McNamara, 12 South. Rep. 103; Welsk v. Coal Co., 24 Atl. Rep. 86; Pifan v. Williams, 63 Ill. 16; Kelly v. Mayor, 1 Kernan, 432; Roemer v. Striker, 2 Misc. 573; Sherm. & Redf. Negl., § 168, p. 284, n. 1; Cinc. v. Stone, 38 N. E. Rep. 41; Searle v. Laverick, L. R. 9 Q. B. 122; Steele v. Ry., 16 C. B. 550; New Alb

one hand, a master cannot convert his servant into an independent contractor by agreeing to exercise no control over him in the manner of doing the work,[11] the employer may, on the other hand, by actual control over an independent contractor, convert him into his servant and become liable for his acts.[12] It is, therefore, important to ascertain under what conditions an employer cannot create the relation of independent contractor, and what contingencies make an independent contractor a servant and his employer liable for his negligence and that of his servants.

Sec. 2. *Liability of Owner or Employer—A. Exercising Control over the Work.*—The relation of independent contractors does not exist where the owner exercises control over the details of the work.[13] Such control may be exercised in various ways: 1. Assuming entire control over the work;[14] furnishing plans and specifications.[15] 2. Directing detail in the work and the means by which it is to be accomplished;[16] furnishing labor and material,[17] or appliances,[18] or reserving the right to take such measures as are necessary for the protection of the public and workmen.[19] In such cases the owner or employer assumes the position of master, either as to the whole of the work or as to parts, and he will be liable for injuries caused by negligence of the contractor or his servants, weakness of the material furnished, incompetency and negligence of his workmen and defects in his appliances.

The mere right of inspection, or only of passage, reserved by the employer so that he may see to a compliance with the contract, does not make the contractor a servant.[20] But if the plan of the work is devised by the employer and the contractor simply engages to carry it out, and the defects from which the injury resulted are inherent in the work, the owner will be liable.[21] Unskillful or negligent arrangement of the work,[22] selection of weak material, renders the owner liable if its insufficiency causes injuries.[23] So in Massachusetts, the employer is liable by statute to employees of an independent contractor for injuries from defects of ways, works, machinery or plant, being his property and, not discovered or not remedied, arising through his or his agent's negligence in seeing that they are in proper condition.[24]

B. Owner or Employer Exercising no Control, Liable.—Such duties, imposed by statute or by general law, the owner is bound to fulfill, and he cannot escape liability by delegating the control of his property to an independent contractor. In such cases, although he exercises no control over the work and property, he may, for this very reason, become liable for injuries resulting from, or caused during the performance of the work, because the law casts on him the duty of guarding against such conditions as caused the injury.

1. If the duty to be performed is a public duty, its non-performance cannot be excused by reason of the engagement of an independent contractor under whose supervision such

Mills v. Cooper, 30 N. E. Rep. 294; Osborn v. Woodford, 1 Pac. Rep. 548; Pack v. Mayor, 4 Seldon, 222; Lettman v. Barnett, 62 Mo. 159; Cooley, Torts, 547; Bailey, Masters, 467, n. 1.

[11] Tiffin v. McCormack, 34 Ohio St. 638.

[12] Farren v. Sellers, 39 La. Ann. 1011; Robinson v. Webb, 11 Bush. 464; Sherm. & Redf. Neg. § 165; Clapp v. Kemp, 122 Mass. 481; Andrews v. Boedecker, 17 Ill. App. 213; Bailey, Masters, 467, n. 2.

[13] Farren v. Sellers, 39 La. Ann. 1011.

[14] Savannah Ry. v. Phillips, 17 S. E. Rep. 82.

[15] Boswell v. Laird, 8 Cal. 469; Wilkinson v. Detroit Works, 73 Mich. 405; Lancaster v. Conn. L. Ins. Co., 5 S. W. Rep. 23, 92 Mo. 460.

[16] Brackett v. Lubke, 4 Allen, 138; Lawyer v. McLean, 10 Mo. App. 591; Andrews v. Boedecker, 17 Ill. App. 213; Corbin v. Am. Mills Co., 27 Conn. 274; Horner v. Nicholson, 56 Mo. 220; Fisher v. Rankin, 78 Hun, 407; Larson v. Metr. Ry., 19 S. W. Rep. 416; Moir v. Hopkins, 16 Ill. 318; Sproul v. Hemmingway, 14 Pick. 1; Hefferman v. Benkard, 1 Robt. 432; Linneham v. Rollins, 137 Mass. 123; Kulwicki v. Munroe, 54 N. W. Rep. 703, 98 Mich. 28; Waters v. Pioneer Fuel Co., 55 N. W. Rep. 52.

[17] O'Driscoll v. Faxon, 31 N. E. Rep 685; Sawyer v. McCloskey, 20 South. Rep. 536; Coughtry v. Globe W. Co., 56 N. Y. 124; Ind. Ry. v. Toy, 91 Ill. 474; De Graff v. N. Y. Ry., 76 N. Y. 125; Latham v. Roach, 72 Ill. 179; Mulchy v. Meth. R. Soc., 125 Mass. 487; King v. N. Y. Central, 66 N. Y. 181; East St. Louis v. Highwater, 92 Ill. 139; 26 L. R. A. 524.

[18] The Dago, 31 Fed. Rep. 574: The Concord, 58 Fed. Rep. 913; Silliman v. Marsden, 9 Atl. Rep. 639; Porter v. Hannibal Ry., 71 Mo. 66; The Reela, 19 Fed. Rep. 926; The Benbrack, 33 Fed. Rep. 687; Steel v. McNeil, 60 Fed. Rep. 105; Mayes v. Chic. Ry., 63 Iowa, 562; Cole v. Chic. Ry., 67 Wis. 272; The Carolina, 30 Fed. Rep. 199, 32 Fed. Rep. 112.

[19] Lake Sup. Iron Co. v. Erickson, 39 Mich. 492.

[20] Bibb v. Norfolk, 14 S. E. Rep. 163; Welsk v. Coal Co., 24 Atl. Rep. 86.

[21] Boswell v. Laird, 8 Cal. 469; Farren v. Sellers, 39 La. Ann. 1011.

[22] Horner v. Nicholson, 56 Mo. 220.

[23] Meir v. Morgan, 52 N. W. Rep. 174.

[24] Toomey v. Donovan, 33 N. E. Rep. 396; Johnson v. Speer, 76 Mich. 139; Savannah & W. Ry. v. Phillips, 17 S. E. Rep. 82; Whitney v. Clifford, 46 Wis. 138.

omission results in injury.[25] It is the owner's duty to prevent injury to the public from work done by a contractor, by proper guards and protection, unless he shows a neglect of duty in the contractor which he had a right to enforce.[26] So failure to support a wall left after a fire in a dangerous condition, known to the owner, renders him liable for injury to adjoining property, caused by a fall of the wall.[27] A building so defectively constructed that it falls without apparent reason is a nuisance, and the owner is liable for injury.[28] So where the wall of an old building fell without the negligence of the contractor and killed plaintiff's wife on her adjoining premises, the owner was liable because the work involved dangers to others, the building was a nuisance and he was charged with the duty of preventing injury caused by its condition.[29] If, therefore, the act undertaken is a nuisance, or necessarily or probably dangerous to others, the person undertaking it through an independent contractor is liable, whether the injury results merely from the condition of the property, the character of the work, or through the negligence of the contractor. But in the latter case the contractor will be liable with the owner.[30] Ratification or confirmation of tortious acts done by contractors renders the employer liable.[31] A building so negligently constructed or so greatly decayed that it is likely to fall upon adjoining property or persons making use of easements over it, is a nuisance.[32] Tearing down an old building is an operation requiring more than ordinary care, not only to prevent damages to adjoining property, but to avoid injury to employees and passers-by.[33] For an injury arising from the nature of the work and not from a failure to execute it, it seems the employer of the independent contractor must be liable,[34] whether he be the owner of the premises or not.[35] Blasting is not dangerous in itself, but the way in which it is done may create danger, and independent contractors are not liable for the negligence of independent subcontractors causing injuries in blasting rocks in an excavation for the building, in absence of any showing that the contractors themselves were negligent.[36] But if done in a city it is dangerous in itself, and the owner employing independent contractors to do work involving blasting will be liable to a person injured, if he knew blasting was necessary, or, learning it was being done, failed to prevent injury.[37] So, if he knowingly employs contractors in the habit of blasting, contrary to ordinance, his implied permission to blast amounts to a direction.[38] So a person, by license, laying pipes in streets, is liable for injuries caused by the negligent manner in which it is done by an independent contractor.[39] The employer causing such dangerous work is regarded as master, and responsible for injuries resulting from the negligence of his contractor.[40] Cutting into a party wall is in itself dangerous and a trespass,[41] and renders all participants liable.[42]

[25] Nelson v. Vermont, 26 Vt. 717; Rockford v. Huflin, 65 Ill. 367; City & Sub. Ry. v. Moores, 30 Atl. Rep. 643; Sherm. & Redf. Negl., § 176; H. & J. Ry. Co. v. Meador, 50 Tex. 77; Pont v. Port Huron, 54 Mich. 13; 14 Am. & Eng. Enc. of Law, p. 835; Moynihan v. Whidden, 143 Mass. 287.

[26] McCleary v. Kent, 3 Duer. 27; Milne v. Smith, 2 Dow. 290; Sheppard v. Creamer, 160 Mass. 486; Sherm. & Redf. Negl., § 174; Sulzbacher v. Dickie, 6 Daly, 469; Hawyer v. Whalen, 29 N. E. Rep. 1049; Dixon v. Pluns, 98 Cal. 384; Dohn v. Dawson, 32 N. Y. S. 59.

[27] Nordheim v. Alexander, 19 Can. S. C. R. 248; O'Connor v. Andrews, 81 Tex. 28.

[28] Wilkinson v. Detroit Steel Co., 73 Mich. 405.

[29] Engel v. Eureka Club, 59 Hun, 593.

[30] Ellis v. Sheffield Co., 2 Ell. & Bl. 766; Cried v. Hartmann, 29 N. Y. 591; Glickauf v. Maurer, 75 Ill. 289; Irvin v. Wood, 51 N. Y. 224, 4 Rob. 138; Chicago v. Robbins, 2 Blackf. 418; Joliet v. Harwood, 86 Ill. 110; Lebanon, El. L. & P. Co. v. Leap, 39 N. E. Rep. 57; Ohio Ry. v. Morey, 7 L. R. A. 701, 47 Ohio St. 207; 23 Am. L. Reg. (N. S.) 101, and cases cited; Moak's Underhill, Torts, p. 277; Congrave v. Morgan, 5 Duer, 495; Sulzbacher v. Dickie, 51 How. Pr. 500; Leslie v. Poundo, 4 Taunt. 649; Wood v. Luscomb, 23 Wis. 287; Clarke v. Fry, 8 Ohio St. 358; Koch v. Sackmann Co., 37 Pac. Rep. 703; Dorritz v. Rapp, 72 N. Y. 307; Woodman v. Metr. Ry., 149 Mass. 335; Lloyd, Bldgs., § 81; Sherm. & Redf. Negl. §§ 168, 174, 176.

[31] Woole v. Wright, 31 L. J. Ex. 513.

[32] Mullen v. St. John, 57 N. Y. 567; Nordheim v. Alexander, 19 Can. S. C. R. 248; Grove v. Fort Wayne, 45 Ind. 429; Simmons v. Everson, 124 N. Y. 319.

[33] Bickford v. Richards, 154 Mass. 163.

[34] Engel v. Eureka Club, 59 Hun, 593; Stores v. Utica, 17 N. Y. 104; Robbins v. Chicago, 4 Wall. 657; Sherm. & Redf. Negl., § 176; St. Paul v. Seitz, 3 Minn. 297; Brusso v. Buffalo, 90 N. Y. 679.

[35] Crenshaw v. Ullman, 20 S. W. Rep. 1077.

[36] French v. Vix, 30 Abb. N. C. 158.

[37] Jones v. McMinimy, 20 S. W. Rep. 435.

[38] Borth v. Rome, 63 Hun, 624; Pye v. Faxon, 156 Mass. 471; Brannock v. Elmore, 21 S. W. Rep. 451.

[39] Colegrave v. Smith, 33 Pac. Rep. 115; Brennan v. Schreiner, 28 Abb. N. C. 481; Ketcham v. Cohn, 2 Misc. 427.

[40] Williams v. Fresno C. Irr. Co., 96 Cal. 14.

[41] Waller v. Lasker, 37 Ill. App. 609.

[42] Ch., K. & W. Ry. v. Watkins, 22 Pac. Rep. 985; Lancaster v. Conn. Life Ins. Co., 5 S. W. Rep. 23.

2. *Employing Incompetent Contractors.*—Although the work require some labor or apparatus in itself dangerous to others, if it may be done and used safely under proper care, as contemplated in the contract, it will be presumed the employer intended it to be done properly and carefully.[43] In such cases the adoption of dangerous methods renders the contractor alone liable. But if from the nature of the work injuries are likely to result, the employer is also liable.[44] So a person employed in tearing down a building which falls before it is expected, will be nonsuited unless he shows further negligence of the owner.[45] It is therefore naturally in the interest of the owner, and the law casts on him the duty of selecting competent and skillful contractors, or the owner will be liable for the contractor's negligence and unskillfulness causing injuries. This is the doctrine of "*culpa in eligendo*," which was applied and well defined in Roman law.[46] So in alterations of a house involving use of a party wall, the law casts upon the owner the duty of seeing that reasonable care and skill is exercised to prevent injury, and he cannot avoid responsibility by delegating the work to an independent contractor.[47] But if he employs competent architects and superintendent, and a workman is injured during the erection of a building in an accident caused by inherent weakness of material the owner is not liable.[48]

3. *Acceptance of Dangerous Premises.*—Acceptance of defective work, which subsequently causes injuries, renders the owner liable, and the liability of the contractor ceases with its acceptance by the employer.[49] And if the independent contractor abandons the work and vacates the premises the owner will be liable for injuries subsequently resulting to third persons,[50] upon the doctrine that the owner is under the legal duty of keeping his premises in a safe condition; although in some cases of endangering the life and limbs of others by furnishing defective work the knowledge that it will be used in reliance upon its solidity, in a dangerous undertaking, may render the maker liable for injuries arising after acceptance by the employer.[51]

Sec. 3. *Liability of Independent Contractors.*—A. The principles of master and servant apply, of course, in all particulars, as well between the contractor and his employees, as between the owner and his servants. The duty of furnishing safe places for work, safe appliances and machinery, competent fellow-servants, warnings of dangers, etc., are as well applicable here as the doctrines of fellow-servants, vice-principal, *respondeat superior*, assumption of risk, etc.[52] And the owner is likewise responsible for the acts of his servants causing injury to employees of independent contractors;[53] although it may be possible in some cases to regard them as fellow-servants by reason of the owner's control over the work.[54]

1. When a servant enters an employment he assumes all the ordinary hazards incident thereto, whether the employment be dangerous or otherwise,[55] and in an obviously dangerous business conducted in a manner fully known at the outset, the servant assumes the risk of its conduct, although a safer way could have been adopted.[56]

[43] Smith v. Simmons, 103 Pa. St. 32; Lawrence v. Shipman, 39 Conn. 587; Bailey v. R. R., 57 Vt. 252; Martin v. Tribune, 30 Hun, 391; Aston v. Nolan, 63 Cal. 269; 23 Cent. L. J. 254.

[44] McDonnell v. Rifle Boom Co., 71 Mich. 61.

[45] Weidman v. Tacoma Co., 35 Pac. Rep. 414.

[46] Hasse, Culpa, 2d Ed. 405.

[47] 23 Am. L. Reg. (N. S.) 93; Carter v. Berlin Mills, 58 N. H. 52; Hilliard v. Richardson, 3 Gray, 349; De Forrest v. Wright, 2 Mich. 371; Horner v. Nicholson, 56 Mo. 220; Scammon v. Chicago, 25 Ill. 424; Homans v. Stanley, 66 Pa. St. 464; Berg v. Parsons, 31 N. Y. S. 1091; Blake v. Ferris, 1 Seld. 48; Pawlett v. R. R., 28 Vt. 298; Boswell v. Laird, 8 Cal. 469; Clark v. Fry, 8 Ohio St. 358; Robinson v. Webb, 11 Bush. 464; Robbins v. Chicago, 4 Wall. 657; Jones v. Chanton, 4 Thomps. & C. 63, 2 Thomps. Negl., § 29.

[48] Walton v. Bryn Mawr Hotel, 160 Pa. St. 3; Norwood Gas Co. v. Bank of Norwood, 63 Conn. 495.

[49] Boswell v. Laird, 8 Cal. 469; Church v. Buckhart, 3 Hill, 193; Mullen v. St. John, 57 N. Y. 567; First Presb. Congr. v. Smith, 26 L. R. A. 504; Barry v. Ferkildsen, 13 Pac. Rep. 657; Fanjey v. Seales, 29 Cal. 249.

[50] Phil. Ry. v. Phil. Towboat Co., 23 How. 209.

[51] Devlin v. Smith, 89 N. Y. 470.

[52] Piette v. Bavaria Br'g Co., 52 N. W. Rep. 152; 39 Cent. L. J. 467; 1 Sherm. & Redf. Negl., §§ 170, 171.

[53] Burke v. Norwich Ry., 34 Conn. 474; Union S. Co. v. Cloridy, L. R. (1894) A. C. 185; Young v. N. Y. Central, 30 Barb. 229; Higgins v. W. U. T. Co., 8 Misc. 433; Kelley v. Allianca, 44 Fed. Rep. 97; Ch., B. & A. Ry. v. Clark, 26 Neb. 645.

[54] Evans v. Lippincott, 47 N. J. L. 192.

[55] Knight v. Cooper, 14 S. E. Rep. 999; Hanrathy v. N. C. Ry., 46 Ind. 280; Louisville Ry. v. Kelly, 63 Fed. Rep. 407; Stewart v. Ohio Ry., 20 S. E. Rep. 922; Wigmore v. Jay, 5 Ex. 354.

[56] Joyce v. Worcester, 140 Mass. 245; Goddard v McIntosh, 37 N. E. Rep. 169; Robinson v. Manh. Ry

2. The employer is not responsible to his employee for injuries received in the occupation for which he was engaged.[57] The master must use ordinary care in protecting his servants from unnecessary risks of employment,[58] and if he fails in this duty he is liable,[59] unless the servant with knowledge of defects in master's premises, continues in his service without proper notice to the latter. In such case he assumes the risk of injuries growing out of such defects.[60] The test as to the assumption of risk by an employee is, whether an ordinarily prudent person of his age and experience under like circumstances would have appreciated the danger,[61] under the exercise of due diligence,[62] which should be measured by character and risk of the business; and the degree of care of all parties is higher when life and limbs of themselves and others are endangered, than in ordinary cases.[63] So where an employee of a building contractor, to do iron work, knowing a hole existed in the floor, voluntarily chose to work near it to save labor, though the foreman was incompetent, the defendant contractors negligent in leaving the hole uncovered, the employee, killed by a fall through the hole, unused to the work, he took the risk and defendants were not liable.[64] But the risk in taking down a heavy arch of stone left after a day's work without support, soaked by rain the next day (Sunday), and upon resumption of work Monday, falling and killing a common laborer, in presence of the contractor, who testified the arch was apparently safe, against the testimony of others skilled in the business, that it was apparently unsafe, though apparent to an experienced mason, is not apparent to a common laborer, and the contractor is liable for negligence.[65] So, under a statute holding the master liable for willful neglect in keeping his premises safe for the use of his servants, he was not held liable for the death of a servant killed in working on dangerous premises, as he knew their condition and continued to use them without objection, since in such case the master is not guilty of willful neglect.[66]

B. Contractor's Liability to Third Persons.—As to third persons the contractor, if he exercises an independent employment, will be liable for injuries caused by his trespass or negligence in a work which might be lawfully and safely done as contemplated in the contract.

1. This liability results from the nature of his employment as independent contractor, which gives him the sole supervision of the work, although he is subordinate to the general plan of the work and to the conditions of the contract.[67] So where the contract is for completion and delivery of the whole work the contractor is alone liable until the work is accepted by his employer.[68] In such cases the owner's or employer's liability begins upon acceptance. But it was held that a carpenter building a scaffold for a painter for the use of his men in painting a dome 90 feet high, is liable for injuries from any defect or negligence in its construction, causing it to give way, and that he owed the duty to the men to make it secure.[69] So may an independent contractor become liable for injuries to servants of another independent contractor caused by a defective scaffold, if it is accepted by the former for the use of his workmen;[70] for he was responsible for the safety

5 Misc. 209; 1 Sherm. & Redf. Negl., § 185. Instances: Schwartz v. Cornell, 59 Hun, 623; Church v. Appely, 58 L. J. Q.B. 144; 14 Am. & Eng. Enc. of Law, pp. 842, 845; Carey v. Sellers, 41 La. Ann. 500; Hutchinson v. York Ry., 5 Ex. 350.

57 Priestly v. Fowler, 3 M. & W. 1, 6; Peterson v. Rushford, 41 Minn. 289; Melville v. Mo. River Ry., 48 Fed. Rep. 820; O'Neill v. Chicago Ry., 31 N. E. Rep. 669; Ill. Central v. Cox, 21 Ill. 20, 26; Richards v. Rough, 53 Mich. 212; Foley v. Jersey City El., 24 Atl. Rep. 487.

58 1 Sherm. & Redf. Negl., § 189.

59 *Ib.* §§ 186, 187; Galveston Ry. v. Daniels, 28 S. W. Rep. 711.

60 Tex. & Pac. Ry. v. Bryant, 27 S. W. Rep. 825.

61 Craren v. Smith, 61 N. W. Rep. 317.

62 McDugan v. N. Y. Central, 31 N. Y. S. 185.

63 Galveston Ry. v. Gormley, 27 S. W. Rep. 1051.

64 Schwartz v. Cornell, 59 Hun, 623.

65 Gill v. Donninghausen, 48 N. W. Rep. 862.

66 Needham v. Louisville Ry., 11 S. W. Rep. 306; Assumption of Risk by Volunteers, 22 L. R. A. 663.

67 Gallagherv. S. W. Exp. Ass., 28 La. Ann. 943; Norwalk Gas Co. v. Bank of N., 63 Conn. 525; Chambers v. Ohio L. J. & T. Co., 1 Dis. (Ohio) 329; Casement v. Brown, 148 U. S. 615; Lottman v. Barnett, 62 Mo. 159; Powell v. Virginia Co., 13 S. W. Rep. 691; St. Louis v. Knott, 16 S. W. Rep. 9; Hunt v. Pa. Ry. Co., 51 Pa. St. 475; Boswell v. Laird, 8 Cal. 469; Kelley v. Mayor, 1 Kernan, 432; Roemer v. Striker, 2 Misc. 573; Pack v. Mayor, 4 Selden, 222; Crenshaw v. Ullman, 20 S. W. Rep. 1077; Long v. Moon, 17 S. W. Rep. 810.

68 St. Louis Ry. v. Willis, 16 Pac. Rep. 728; Atlanta Ry. v. Kimberly, 16 S. E. Rep. 277; Welsk v. Coal Co., 24 Atl. Rep. 86; Curtain v. Sommerset, 21 Atl. Rep. 244.

69 Devlin v. Smith, 89 N. Y. 470.

70 Mauer v. Ferguson, 17 N. Y. S. 349.

of his appliances to be furnished by him under the contract.[71]

2. Such responsibility may be assumed by express stipulation. If the contractor agrees to inspect and keep in safe condition all appliances furnished to him by the owners,[72] or to direct the use of such appliances,[73] or where the contract is for completion and delivery of the whole work, the contractor alone is liable and not the owner.

3. *Trespass or Dangerous Methods not Contemplated by the Parties.*—Where the enterprise is lawful and entrusted to competent and skillful contractors, the mere fact that the improvements are erected or work done upon the land of the employer, is no reason why he should be liable during the progress of the work, any more than if such enterprise be executed elsewhere.[74] To hold the employer liable in such case some neglect of duty must be shown against him.[75] Even for an injury caused by negligence of the owner's servants, actually engaged in executing the work under an independent contractor, the owner will not be liable unless his negligence is shown.[76] A scaffold suspended from the eaves of a house near a public street for the purpose of repairing and improving a building is not necessarily a nuisance, so as to make the owner liable.[77] If dangerous work can be safely completed by proper precautions contemplated in the contract, not the employer, but the contractor alone is liable for injuries caused by the contractor's negligence,[78] or by the negligence of the contractor's servants,[79] while the cases cited clearly show that in absence of the contractor's negligence the owner is liable for injuries resulting from the work.[80] If the contractor uses unnecessarily dangerous means not contemplated by the parties,[81] or in the performance of the work commits a trespass unauthorized by the contract and not contemplated by the parties, he alone is liable.[82]

Sec. 4. *Joint Liability of Employer and Contractor.*—This liability takes effect if the necessary or probable consequence of executing the work contracted for will be to injure other persons or their property, or to create a nuisance.[83] For injury caused by a ditch dug across the street and left unguarded during the night, the independent contractor was held liable upon the following principle: Where the obstruction or defect created in the street is purely collateral to the work contracted for and entirely the result of the wrongful acts of the contractor or his servants, the employer is not liable; but where the obstruction or defect causing injury results directly from the acts which the contractor agreed and was authorized to do, the employer is equally liable to the injured person.[84] The employer is liable if he knows dangerous work will be necessary (blasting),[85] and selects incompetent contractors;[86] notwithstanding the contractor stipulates to take the risk and all responsibility.[87] So if the execution of the work is a trespass, or a trespass is committed or nuisance created by the

[71] Larock v. Ogdensburg, 26 Hun, 382; Barrett v. Singer Co., 1 Sweeney, 545.

[72] King v. N. Y. Central, 66 N. Y. 181.

[73] Lathan v. Roach, 72 Ill. 179; Pierce v. Whitcomb, 48 Vt. 127; Bailey, Masters, 472, n. 18; Malone v. Hawley, 46 Cal. 409; Samuelson v. Mining Co., 49 Mich. 164.

[74] Boswell v. Laird, 8 Cal. 469; Welsk v. Coal Co., 24 Atl. Rep. 86.

[75] Lawrence v. Shipman, 39 Conn. 589.

[76] Boswell v. Laird, 8 Cal. 469; Kelly v. Mayor, 1 Kernan, 432; Butts v. J. C. Mackey Co., 72 Hun, 562; Pack v. Mayor, 4 Selden, 222; Lattman v. Barnett, 62 Mo. 189.

[77] Hexamer v. Webb, 101 N. Y. 377; 23 Cent. L. J. 249.

[78] Engel v. Eureka Club, 137 N. Y. 100; Williams v. Fresno Co., 96 Cal. 14; City & Sub. Ry. v. Morres, 30 Atl. Rep. 643; De Forrest v. Wright, 2 Mich. 368; Roemer v. Striker, 2 Misc. 573; Meyer v. Thompson Co., 16 South. Rep. 620; Riedel v. Moran F. Co., 61 N. W. Rep. 509.

[79] Fulton County Ry. v. McConnell, 13 S. E. Rep. 828; McCann v. Kings County Ry., 19 N. Y. S. 668; Harding v. Boston, 39 N. E. Rep. 411; Butts v. J. C. Mackey Co., 72 Hun, 562.

[80] Engel v. Eureka Club, 137 N. Y. 100.

[81] West v. St. Louis Ry., 63 Ill. 545; Hackett v. W. U. T. Co., 80 Wis. 187.

[82] Ch., R. I. & P. Co. v. Ferguson, 33 Pac. Rep. 684; McDonell v. Rifle Boom Co., 71 Mich. 61; St. Louis v. Knott, 16 S. W. Rep. 9; Atlanta Ry. v. Kimberly, 13 S. E. Rep. 277.

[83] Ohio Ry. v. Morey, 47 Ohio St. 207, 7 L. R. A. 701; Hughes v. Cinc. Ry., 39 Ohio, 476; Circleville v. Needing, 41 Ohio St. 465; McDonell v. Rifle Boom Co., 71 Mich. 61; St. Louis Ry. v. Yonley, 14 S. W. Rep. 800; Carman v. Steubenville, 4 Ohio St. 399; Bower v. Peate, L. R. 1 Q. B. D. 321.

[84] Storris v. Utica, 17 N. Y. 108; Robbins v. Chicago, 4 Wall. 657; Chicago v. Robbins, 67 U. S. 418 (2 Black).

[85] Booth v. Rome, 63 Hun, 624.

[86] Barg v. Parsons, 31 N. Y. S. 1091.

[87] Dorrity v. Rapp, 72 N. Y. 307; Bower v. Peate, L. R. 1 Q. B. D. 321; Dalton v. Argus, L. R. 6 A. C. 829.

contractor in executing the work in accordance with the contract or directions of the employer, both are liable.[88] In conclusion, reference may be made to Lawrence v. Shipman,[89] where four rules for determining the liability for the negligence of an independent contractor are given. The essence of these four rules may be expressed as follows: The relation of independent contractor exempting the employer from liability for negligence of his contractor, exists only where a competent and skillful person in a lawful undertaking to be accomplished by lawful means, not attended by unusual, obvious or probable danger to others, exercises such complete control and possession over the work contracted for that the employer's will and control is merely manifested in the result to be attained, not in the detail and methods of work; otherwise the relation of master and servant exists, rendering the employer liable for the contractor's negligence.

G. W. DUWALT.

Chicago, Ills.

[88] Ch., K. & W. Ry. v. Watkins, 22 Pac. Rep. 985; Williams v. Fresno Co., 96 Cal. 14; Ch., R. I. & P. Co. v. Ferguson, 33 Pac. Rep. 684; McDonnell v. Rifle Boom Co., 71 Mich. 61.

[89] 39 Conn. 589.

DESCENT AND DISTRIBUTION — CHILDREN BORN DURING MARRIAGE—PRESUMPTION OF LEGITIMACY—EVIDENCE.

SCANLON V. WALSHE.

Court of Appeals of Maryland, March 27, 1895.

The presumption that children born while their mother was living in lawful wedlock with her husband are legitimate is conclusive, in the absence of proof of impotency of the husband, or evidence negativing the possibility or probability of access.

On an issue as to the legitimacy of a woman's children born while she was living in lawful wedlock with her husband, the testimony of the alleged father is inadmissible.

The marriage of a woman with one alleged to be the father of children born to her while living in lawful wedlock with a former husband is not evidence of their illegitimacy, but is admissible after proof of illegitimacy to show paternity.

A husband or wife is incompetent to testify that children born to the wife during wedlock are bastards.

FOWLER, J.: It is fortunate that courts of justice are seldom called upon to consider a case in which the facts are so shocking to every sense of decency and morality as those presented by the record now before us. We shall not attempt in this opinion to discuss with any particularity the testimony which we think justifies this remark, for the view which has been forced upon us, after careful consideration, renders such an uninviting task altogether unnecessary.

On the 26th March, 1891, David J. Walshe, of Baltimore city, died, leaving a will disposing of his personal property and one-third of his real estate, and intestate as to the balance of his real estate, which latter consisted of by far the larger and more valuable part of the property, known as the "Mansion House," on the northwest corner of Fayette and St. Paul streets, in said city. A bill was filed in the Circuit Court of Baltimore city by Carlotta Walshe, for the sale of said real estate, against a number of persons claiming to be heirs at law of her husband, David J. Walshe, three of them being her own children, born while she was living in lawful wedlock with a former husband, and the others being sisters and the children of a deceased sister of said Walshe. Proper proceedings were had, and, by agreement of parties, the whole property was sold for the sum of $70,000, which sale was duly confirmed. By a *pro forma* order, the court below ratified auditor's account B, by which the sum of $25,795.41 was allowed to three children of the plaintiff, as their share of the proceeds of sale. From this order the sisters and the children of a deceased sister of Walshe have appealed; and the question is, who are the heirs at law of David J. Walshe?

There are two sets of claimants: First, two sisters and several nephews and nieces; and secondly, the plaintiff's three children, the youngest of whom is about 24 years of age, who, although born while their mother was married to and living in lawful wedlock with her first husband, Florian V. Simmonds, from whom she was divorced, claim to be the children of said Walshe, whom she afterwards married, and his heirs at law, because subsequent to their birth their mother and their alleged father married, and he acknowledged them to be his children.

A contention whose foundations are so contrary to good morals, public policy, and the presumptions of law can be maintained only by some statute which not only introduces "a new law of inheritance," as our statute does (Brewer v. Blougher, 14 Pet. 178, opinion by Chief Justice Taney), but which, to bring this case within its terms, must also abrogate some rules of evidence which we are not inclined either to weaken or destroy. The statute upon which the appellees, the children of Carlotta Walshe, rely to maintain their contention, is section 29, art. 46, of the Code, which provides that "if any man shall have a child or children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgment, be hereby legitimated and capable in law to inherit and transmit inheritance as if born in wedlock." This section

was before this court for construction in the case of Hawbecker v. Hawbecker, 43 Md. 516, where a married man had by his wife four children born in lawful wedlock, and during the life of his wife he also had six children by another woman. His wife died, and he subsequently married the mother of the last-mentioned children, whom he acknowledged as his, and treated them as he did the children of his first wife. It was very earnestly contended in that case that the section above quoted should not be construed so as to include within its terms a case in which children are conceived and born when their parents are under impediment to marry. But it was held that although the legislature, no doubt, in thus mitigating the severe rule of the common law, intended to hold out to the surviving parents an inducement to marry, and thus put a stop to the further illicit intercourse between them, yet "the main purpose and intent of the enactment * * * was to remove the taint and disability of bastardy from the unoffending children, whenever their parents did marry, without regard to the deepness of the guilt on the part of the parent." And, in concluding the opinion, the language of Chief Justice Taney in the case of Brewer v. Blougher, *supra*, to the same effect, in relation to the same provision of law, is quoted approvingly. We said: "The legislature has not seen fit to make any exceptions to its operation. Its terms embrace every case where 'any man shall have a child or children by any woman whom he shall afterwards marry.'" Hawbecker v. Hawbecker, *supra*. It will be observed, however, that in the case we have last cited there was no question whatever made as to the paternity or illegitimacy of the children who were admitted to have been born out of wedlock. It was assumed that the reputed was the real father, and that the children were illegitimate; and the only question was whether the law was applicable to the admitted facts. But here we have a different condition. Indeed, this is the very opposite to Hawbecker's Case; for, while the force of the broad terms of the law is here admitted, it is contended that the foundation of facts—the facts of illegitimacy and of the alleged paternity—are not established at all, because—First, the witnesses are incompetent; and, secondly, even if competent, their evidence is not of that strong, distinct, satisfactory, and conclusive character which is required to overcome the presumption expressed in the common-law rule "*Haeres legitimus est quem nuptiae demonstrant*," or another expression of the same rule, "*Pater est quem nuptiae demonstrant*." The old rule in England was, and also in this country (1 Greenl. Ev. § 28), that this presumption of legitimacy was conclusive. But it is said the courts did not long permit so violent an estoppel. 1 Bish. Mar. & Div. § 1170. This legal presumption has been characterized as the foundation of every man's birth and, *status* and of the whole fabric of human society, and nowhere has its full force and extent been so fully acknowledged and so well expressed as in the case of Hargrave v. Hargrave, 9 Beav. 553, by Lord Langdale, the then master of rolls, decided in 1846. He says: "A child born of a married woman is, in the first instance, presumed to be legitimate. The presumption thus established by law is not to be rebutted by circumstances which only create doubt and suspicion; but it may be wholly removed by proper and sufficient evidence showing that the husband was (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse." "Such evidence as this," says his lordship, "puts an end to the question, and establishes the illegitimacy of the child of a married woman." And in the same case it was held that where opportunities occurred for sexual intercourse between the husband and wife, and there was no proof of his impotency, no evidence can be admitted to show that any man other than the husband may have been or probably was the father of the wife's child. It was said in Craufurd v. Blackburn, 17 Md. 56, that the declarations of the parents were not admissible to defeat the consequences of marriage, such as that the children are bastards; and Lord Mansfield said in Goodright v. Moss, Cowp. 594: "It is a rule founded in decency, morality, and policy that the father and mother shall not be permitted to say after marriage that the offspring is spurious." And, in our opinion, the testimony of the adulterer, when offered for the same purpose, should likewise be excluded; especially so in all cases in which it appears that the proof does not exclude the possibility or probability of access of the husband to the wife. In such cases, as Lord Langdale said in Hargrave v. Hargrave, *supra*, there being no proof of impotency, no evidence will be admitted to show illegitimacy. To this extent, at least, we think the presumption of the legitimacy of the child of a married woman should be conclusive.

The mere fact of marriage and acknowledgment should not, under the facts of this case be received as proper evidence of illegitimacy. The fact of illegitimacy should first be proved, and then the marriage and acknowledgment may be offered to prove paternity. And so it was held in Grant v. Mitchell, 83 Me. 27, 21 Atl. Rep. 178. And in Hemmenway v. Towner, 1 Allen, 209, the declarations of the adulterer offered to show illegitimacy of the child of a married woman were excluded, the husband and wife having lived together as such until six months next before the birth of the child. It is true these two cases, last cited, were decided upon statutes not altogether like ours; but the questions decided were questions of evidence, and we think that was said in those cases on this subject is particularly applicable to this case.

Now, the only testimony before us which can properly be resorted to, to prove illegitimacy, is that of the plaintiff Carlotta Walshe, which, as we have seen, is inadmissible for that purpose. At the most, her testimony may be offered to show she was untrue to her husband. 1 Bish. Mar. & Div. And so, also, as to the declarations and letters of David Walshe which appear to have been offered to prove acknowledgment of the children. Neither will be admissible to show the husband is not the father, if he had or could have had access, as indicated in Hargrave v. Hargrave, *supra;* and that he could have had access, we think, is clearly shown in this case, for the separation did not occur until several years after the birth of the youngest child. But the testimony of Carlotta Walshe, as well as that of the adulterer, if he were alive, would be inadmissible to show bastardy, and equally so his declarations, because they are both estopped to swear to a state of facts in conflict and inconsistent with the proceedings for divorce, and for change of name of her three younger children. She will not be allowed now to come into court, and recklessly contradict what she alleged in the one and swore to in the other. Edes v. Garey, 46 Md. 41; Hall v. McCann, 51 Md. 351; Railroad Co. v. Howard, 13 How. 335. And it appearing that he was the instigator of both proceedings, and in a position to know the truth, the estoppel should work equally against him, his declarations and his letters.

In the supplemental brief on the part of the alleged children of Walshe, filed a few days ago, it is suggested that the objections now relied on in this court to most of the testimony are not covered by the exceptions filed by the appellants below, and David J. Walshe is spoken of as a witness whose testimony was objected to below only on the ground of estoppel. It should, however, be observed that he is not a witness. His declarations, verbal and written, were offered, and the testimony of all the witnesses who testified to the former, as well as the latter, which were offered in evidence, all of which was offered to show recognition of the children, was excepted to on the ground of estoppel. And, while it may be that the estoppel of the divorce and other proceedings may not go to the extent urged by the appellants, yet, as we have already said, both David J. Walshe, if living would be, and Carlotta Walshe, is thereby estopped to take positions inconsistent therewith. And we think the exceptions on the ground of estoppel, filed below, fairly cover the additional grounds of estoppel urged in this court; for while it is required that every exception, in order to be availed of in this court, must be reduced to writing, and filed in the court below at least before the hearing there begins, yet it is not necessary to set forth all the reasons and grounds on which such exceptions are based.

But we think it unnecessary to prolong this discussion. It is conceded the exceptions filed below cover the testimony of Carlotta Walshe as to non-access, and having sustained the exception based on this objection, her testimony as to any collateral fact for the purpose of proving non-access would also be inadmissible. Wrightman, Mar. & Leg. 1441. And it must be remembered that we have been considering what is the true rule by which to measure the amount and character of evidence required to prove the child of a married woman to be a bastard, which child is born while the mother is living in lawful wedlock with her husband. And although, in this particular case, the woman herself and her children, the youngest of whom is 24 years old, are trying to establish the illegitimacy of the children, and for that purpose are asking us to destroy or weaken this rule, which the experience of many years and the wisdom of eminent judges have sanctioned, we must remember that such position is seldom occupied by either the mother or her offspring. She and [they are more frequently interested in guarding and enforcing the rule which protects the rights of legitimate rather than the rights of illegitimate children. We feel bound to say, however, that, if all the testimony we have thus excluded were properly before us, we could not, while giving full force and effect to the legal presumption of legitimacy, and in the absence of that strong, distinct, satisfactory, and conclusive testimony required to overcome that presumption, do otherwise than reverse the *pro forma* order appealed from. Order reversed, and cause remanded; costs to be paid out of the fund in hand of the trustees.

NOTE.—Legitimacy is the state of being born in wedlock, that is, in a lawful manner: Bouvier's Law Dict. tit. 2, p. 67. Lawful birth: Black's Law Dictionary, p. 702. Parentage may at law be established and can only in general be so established as regards the father by a combination of facts indicating the connection of the parent and the child, between an individual and the family to which he claims to belong. Among the principle of these facts are that his mother was married to the person whom he claims as his father at the time he was born or begotten; that he has always borne his name and been treated and maintained and educated as his child; that he has been uniformly received as such in society, and that he has been acknowledged as such by the family. These things being shown his legitimacy is presumed. See article on Proof of Legitimacy by John D. Lawson in 18 Cent. L. J. 262; Weatherford v. Weatherford, 20 Ala. 548; Illinois Loan Co. v. Bonner, 75 Ill. 315; Barnum v. Barnum, 42 Md. 253; Caujolle v. Ferrie, 23 N. Y. 91; Orthwein v. Thomas, 127 Ill. 554, 11 Amer. State Rep. 159, with note. Where a man speaks of a child as his daughter the presumption is that she is legitimate. Gaines v. New Orleans, 6 Wall. (U. S.) 690; Gaines v. Herman, 24 How. (U. S.) 553. Every child in a civilized community is presumed to be legitimate where the mother was cohabited with and recognized by the father as his wife, and in the absence of any proof to the contrary no other evidence of a legal marriage will be necessary to legitimize the offspring. Strode v. Magowan, 2 Bush, 627. Evidence of general reputation that a child is illegitimate is incompetent. Had-

dock v. R. R. Co., 3 Allen, 298, 81 Amer. Dec. 656. A child is legitimate if born within matrimony, though born within a week or a day after marriage. Rhyne v. Hoffman, 6 Jones Eq. 335. In most of the States bastards are made legitimate by the subsequent marriage of their parents. Schouler on Domestic Relations, 226; 2 Lawson's Rights, Remedies & Practice, p. 1464. The issue of a voidable as distinguished from a void marriage are legitimate. Sneed v. Ewing, 5 J. J. Marsh. 460. For the protection of the innocent children, many of the States, in their statutes of descents and distributions, have a clause providing that "the issue of all marriages deemed null and void in law . . . shall be legitimate." Dyer v. Brannock, 66 Mo. 391; Graham v. Bennett, 2 Cal. 503. When there has been a marriage and husband and wife have cohabited together and no impotency is shown, the issue is conclusively presumed to be legitimate, though the wife is shown at the same time to have been guilty of infidelity either before or after marriage. Hemmenway v. Towner, 1 Allen (Mass.), 209. The presumption of legitimacy may be rebutted by showing that the husband was first incompetent, second, entirely absent so as to have no intercourse or communication of any kind with the mother; fourth, only present under circumstances affording clear and satisfactory proof that there was no sexual intercourse. Hargrave v. Hargrave, 9 Beav. 255; State v. McDowell (N. C.), 7 S. E. Rep. 785; Scott v. Hillenburg (Va.), 7 S. E. Rep. 377. The presumption of legitimacy still holds where the parties are living apart by mutual consent but not if divorced. 13 Amer & Eng. Encyclopædia of Law, p. 226; Hemmenway v. Towner, 1 Allen (Mass.), 209. Neither the evidence of the husband nor wife is admissible to prove access or non-access. Dennison v. Page, 29 Pa. St. 420; Parker v. Way, 15 N. H. 45; People v. Ontario, 15 Barb. (N. Y.) 286; Kleinhart v. Ehlers, 38 Pa. St. 439; Rex v. Sourton, 5 A. & E. 180; State v. Herman, 13 Ired. (N. C.) 502.

Recent Decisions on the Subject.—Letters from the mother of an illegitimate child to its nurse may be admitted in evidence for the purpose of showing her assent to the disposition that is being made of the child, and the manner in which it is provided for, but are incompetent for the purpose of proving paternity. *In re* Jessup's Estate (Cal.), 22 Pac. Rep. 742, 81 Cal. 408. Pictures of the putative father and of the illegitimate child, taken by photography, are not inadmissible in evidence for the purpose of showing resemblance between the two. *In re* Jessup's Estate (Cal.), 22 Pac. Rep. 742, 81 Cal. 408. The presumption of legitimacy of a child born in wedlock is so strong that it cannot be overcome by proof of the wife's adultery, while cohabiting with her husband; much less by the mere admission of the adulterer. Grant v. Mitchell (Me.), 21 Atl. Rep. 178. A mother is competent to show that her son was born "eleven or twelve years" before her marriage, and is a bastard, and that his father was one other than her husband. Appeal of McDonald (Pa.), 23 Atl. Rep. 892, 30 W. N. C. 166. Where the evidence shows that J is the child of a certain man and woman, and was treated and recognized as such by them and by the different members of their respective families, and it further appears that all these parties are dead, legitimacy will be presumed in the absence of rebutting testimony, though there is no evidence of the marriage of such a man and woman. *In re* Robb's Estate (S. Car.), 16 S. E. Rep. 241; *Ex parte* Eason, *Id.*; *Ex parte* Muir, *Id.* The presumption of legitimacy from the birth of a child during marriage may be rebutted by evidence that the husband could not be the father of the child; and where a mulatto child is born of a white woman, whose husband is white, it may be shown that it is contrary to the laws of nature for both the parents of a mulatto to be white. Bullock v. Knox (Ala.), 11 South. Rep. 339.

BOOK REVIEWS.

THOMPSON ON PRIVATE CORPORATIONS.

The author as well as the profession are to be congratulated upon the appearance of these commentaries, undertaken many years ago and delayed in completion through the author's labors upon an overburdened appellate court. A compensation for their delay may be found in the fact that though designed and announced to be in three volumes, it has been found necessary to extend them into six volumes, each of one thousand pages, this in large measure owing to the changes and progress, during the past ten years, in the American law of private corporations. As the author says in his preface, the American doctrine that the capital stock of a corporation, including its unpaid subscriptions, are a trust fund for its creditors, has during that period been greatly modified. So the doctrine formerly held by State courts and adopted by the United States Supreme Court that the shares of a corporation can be sold only at their full value, either in money or property, has been greatly shaken. The doctrine announced in Munn v. Illinois, that the legislature of a State may, in the exercise of a police power, limit the charges of corporations, clothed with a public interest, is no longer without question. Again, the birth and growth of what is known as "trusts" or combinations of corporations, together with the statutes designed to repress or affect them, has developed a new line of judicial decisions. In view of all this we regard the profession as having gained something by a delay which enables them to obtain the opinions of so eminent an authority as Mr. Thompson upon the many and vexatious problems springing out of these questions. We have before us the three first volumes of the series. The remaining three volumes are to make their appearance shortly. It would be impossible within the necessary limits of this review to enter with detail upon the features of the work. It is divided into nineteen separate titles as follows:

Title I. Organization and Internal Government.
Title II. Capital Stock and Subscriptions Thereto.
Title III. Remedies and Procedure to Enforce Share Subscriptions.
Title IV. Shares Considered as Property.
Title V. Liability of Stockholders to Creditors.
Title VI. Directors.
Title VII. Rights and Remedies of Members and Shareholders.
Title VIII. Ministerial Officers and Agents.
Title IX. Formal Execution of Corporate Contracts.
Title X. Notice, Estoppel, Ratification.
Title XI. Franchises, Privileges and Exemptions.
Title XII. Corporate Powers and the Doctrine of *Ultra Vires*.
Title XIII. Corporate Bonds and Mortgages.
Title XIV. Torts and Crimes of Corporations.
Title XV. Insolvent Corporations.
Title XVI. Dissolution and Winding Up.
Title XVII. Receivers of Corporations.

Title XVIII. Actions by and against Corporations.
Title XIX. Foreign Corporations.

The extent and variety of the questions under consideration may be understood when it is stated that within these titles are two hundred and one chapters, each chapter divided into many sections, their total number in the six volumes being some eight thousand. We have particularized in giving the above figures in order that the reader may appreciate the magnitude of the work and the comprehensiveness of its character.

As to the manner in which the labor of Mr. Thompson has been performed it is enough to say that it is beyond any criticism, and that it is of a kind which is to be expected from one whose ability as a book writer has been demonstrated and established for years. In point of accuracy, diligence, originality of thought, and freedom to express an opinion, we have no law book writer who surpasses Mr. Thompson, and, though like the rest of human kind, his opinions may not be invariably correct, the student will always find something valuable in his views and discussions. There is one special merit in this work, to which we call attention as being different from most modern text-books, and that is the effort of the author to treat every topic with such fullness of detail that the state of the law in respect of it can be learned from the pages of the work and without the necessity of the reader searching the adjudged cases. To this end the author states not only what the courts have decided but also the reasons which they have given for their decisions. In this respect the work differs as much from the ordinary text-book as a commentary of law may differ from the United States Digest.

In conclusion we beg to commend this latest work on corporations to the profession, and to say that the corporation attorney will find in its pages the entire modern law of corporations compiled and ready for immediate and practical application. The volumes are beautifully printed and bound in best law sheep. Published by Bancroft-Whitney Company, San Francisco.

BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States. Selected, Reported and Annotated, by A. C. Freeman, and the Associate Editors of the "American Decisions." Vol. 42. San Francisco: Bancroft-Whitney Company, Law Publishers and Booksellers. 1895.

A Digest of the Missouri Reports, Embracing Volumes 101 to 121, of the Supreme Court Reports, Volumes 42 to 58 of the Reports of the Court of Appeals, and all the Unreported Cases in Volumes 25 to 27 of the Southwestern Reporter. In Two Volumes. Vol. II. By Everett W. Pattison of the St. Louis, Bar. St. Louis, Mo.: The Gilbert Book Company. 1895.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE.—The death of an officer, resulting from wounds inflicted by a prisoner while resisting arrest, is not death from "accidental injuries," within the meaning of that phrase as used in an accident policy.—AMERICAN ACCIDENT CO. OF LOUISVILLE v. CARSON, Ky., 30 S. W. Rep. 879.

2. ADMINISTRATION—Judgment — Fraudulent Representations.—Where an order of probate court is obtained by fraudulent representations, the court has jurisdiction to set aside the order after the term wherein said order was made has expired unless the representations were immaterial.—HIRSHFIELD v. BROWN, Tex., 30 S. W. Rep. 962.

3. ADMINISTRATION—Sale of Minor's Land—Collateral Attack.—Where it appears from the records of a probate court relating to a sale of real estate by a guardian or an executor or an administrator, which are complete and regular upon their face, that each and all of the essentials of a valid sale named in this statute have been complied with, such records import unimpeachable verity, and the presumptions arising therefrom cannot be rebutted in a collateral proceeding by any evidence dehors the record.—KURTZ v. ST. PAUL & D. R. Co., Minn., 63 N. W. Rep. 1.

4. ADVERSE POSSESSION—As Between Joint Tenants.—Occupancy of land and payment of taxes thereon by one cotenant is not adverse to another cotenant in the absence of direct notice by the former to the latter that

he is holding adversely, or of overt acts unequivocally showing that such holding is adverse.—SCOFIELD v. DOUGLASS, Tex., 30 S. W. Rep. 817.

5. ANIMAL—Vicious Dog.—Under St. Ky. § 68, providing that an owner of a dog shall be liable for injuries done by it, he is liable for actual damages, though he did not know of the dog's vicious disposition, and for punitive damages, if he had such knowledge.—KOESTEL v. CUNNINGHAM, Ky., 30 S. W. Rep. 972.

6. APPEAL—Harmless Error.—The fact that a witness, either voluntarily or by compulsion of court, answers questions relevant to the issue and admissible, but which he has the privilege of not answering, is not available to the party producing the witness as ground for reversal.—INGERSOL v. MCWILLIE, Tex., 40 S. W. Rep. 869.

7. APPEAL—Jurisdiction.—Plaintiff alleged that defendant held over as tenant, and owed for rent. The answer was a general denial; a purchase by verbal agreement, under which defendant made valuable improvements, and paid part of the price; and, in addition, settlement in full of the price. No affirmative relief was sought by or decreed to defendant: Held, that, as a judgment under the pleadings could not settle the question of title, the jurisdiction of the appeal is in the appellate court.—CORBIN v. THOMPSON, Ind., 40 N. E. Rep. 532.

8. APPEAL—Parties.—An appeal by a husband from a judgment against himself and wife will be dismissed for want of jurisdiction, unless the wife is a party to the appeal.—INMAN v. VOGEL, Ind., 40 N. E. Rep. 665.

9. APPEAL—Presumptions.—Where a party duly excepted to the ruling of the court in dismissing an appeal, but where the facts leading to the judgment, or the grounds of dismissal, are not preserved in the record, it will be presumed that the judgment was warranted by the facts before the court.—CHICAGO, R I. & P. RY. CO. v. TOWN OF CALUMET, Ill., 40 N. E. Rep. 625.

10. APPEAL—Questions not Raised Below.—Where a statute is claimed to be invalid on the ground that it was not enacted in the constitutional mode, such invalidity must be presented by the pleadings or in some other form in the trial court, to be of any avail here. Such objection cannot be raised for the first time in the appellate court.—CLEARWATER BANK v. KURKONSKI, Neb., 63 N. W. Rep. 133.

11. APPEAL FROM JUSTICE'S COURT.—An undertaking given for the purpose of appealing a case from a justice of the peace to the district court is approved by the justice if he receives it, examines it, and expresses himself as "satisfied," and retains it in his custody.—BINGHAM v. SHADLE, Neb., 63 N. W. Rep. 143.

12. APPEARANCE — Garnishment.—An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Whether it is general or special is to be determined by an examination of the substance of the pleading, and not by its form.—SOUTH OMAHA NAT. BANK v. FARMERS' & MERCHANTS' NAT. BANK OF FREMONT, Neb., 63 N. W. Rep. 127.

13. APPLICATION OF PAYMENTS. — Plaintiff held two notes against defendant,—one as executor, the other in his own right, as assignee, without defendant's knowledge; and in answer to his request for money, made on the ground that "one of the heirs" needed it, defendant remitted a check: Held, that the same should be applied on the note held by plaintiff as executor.—MOOSE v. MARKS, N. Car., 21 S. E. Rep. 561.

14. ARBITRATION—Sufficiency of Award.—Where an agreement to arbitration did not require a statement in the award of the conclusions of the arbitrators upon the subject of damages, an award of a gross amount to one party, without reference to the claims of the other, is sufficient compliance with the agreement.—GILL v. BICKEL, Tex., 30 S. W. Rep. 919.

15. ASSIGNMENT FOR BENEFIT OF CREDITORS.—An instrument conveying all the property of an insolvent to another, and giving him power to sell the property and pay the debts, and return the balance to the grantor, is a statutory assignment, and not a mortgage.—LOCHTE v. BLUM, Tex., 30 S. W. Rep. 925.

16. ASSIGNMENT FOR BENEFIT OF CREDITORS—Cancellation of Fraudulent Conveyances.—Creditors of one who has assigned for the benefit of creditors may sue to set aside previous fraudulent conveyances, though the assignee may not.—DITTMAN v. WEISS, Tex., 30 S. W. Rep. 863.

17. ASSIGNMENT FOR BENEFIT OF CREDITORS—Mortgage.—An instrument conveying all of an insolvent's property to secure all his debts, and providing that after the debts are paid the remaining property shall be returned to the grantor, is a mortgage, and not an assignment for creditors.—ADAMS v. BATEMAN, Tex., 30 S. W. Rep. 855.

18. ASSIGNMENT FOR BENEFIT OF CREDITORS—Validity. —Where an assignment purports to convey all the debtor's property to be equally distributed among all his creditors, and the same is accepted by the assignee and by a majority in number, if not in amount, of all the creditors, it cannot be held fraudulent on its face, although it contains provisions which might be objectionable if the assigument were one granting preferences; nor can such assignment be set aside because of the fraudulent intent of the assignor, not shown to have been participated in by the assignee and the accepting creditors.—PORTER v. JAMES, U. S. C. C. of App., 67 Fed. Rep. 21.

19. ASSIGNMENT OF CLAIM—Ownership by Assignor. —In an action for the price of logs sold to defendant by one M, who assigned the claim to plaintiffs, it was not error to refuse an instruction that plaintiffs could not recover if the logs did not belong to M at the time of the assignment, there being evidence that at the time of such assignment M was acting as agent for the owner, who subsequently ratified his act.—FLECKENSTEIN v. INMAN, POULSEN & CO., Oreg., 40 Pac. Rep. 87.

20. ASSUMPSIT—Breach of Contract.—Where a person agrees to take clay from beds, to be paid for at a certain rate according to the quantity and quality of the clay so to be raised, and has stripped off the surface earth, but, before he has raised any clay, is stopped in his work by the owner of the beds, with whom he has contracted, a suit will not lie in the common courts for the cost of such stripping. If such contract has been illegally terminated, the remedy of the injured party is to sue on the contract, laying his damage for the loss of such profits as he would have made by the completion of the contract.—RYAN v. REMMEY, N. J., 31 Atl. Rep. 766.

21. ATTACHMENT — Fraudulent Conveyances.—In an attachment proceeding based on allegations that the debtor was about to fraudulently dispose of his property, the fact that an instruction stated that the fraudulent act must "be on the very eve of consummation" is not cause for reversal, where the correct rule is substantially given in other instructions.—DUEBER WATCH-CASE MANUF'G CO. v. YOUNG, Ill., 40 N. E. Rep. 582.

22. ATTACHMENT—Grounds.—The shipment of products of an enterprise out of the State in the due course of business is not sufficient ground for an attachment where the removal is not permanent, and the proceeds are brought back within the State.—CLINCH RIVER MINERAL CO. v. HARRISON, Va., 21 S. E. Rep. 660.

23. ATTACHMENT—Release of Property.—A defendant in attachment may turn over to the levying officer sufficient money to satisfy the claim and costs, to abide the suit, in order to release the property seized. —SOLOMON v. SALY, Colo., 40 Pac. Rep. 150.

24. ATTACHMENT BOND—Set-off.—In an action upon an attachment undertaking a claim due the principal in such bond from the plaintiff is a proper subject of set-off.—FIELD v. MAXWELL, Neb., 63 N. W. Rep. 62.

25. ATTACHMENT LEVIES—Priorities.—A sheriff cannot, by virtue of a writ of attachment which came to his hands before another writ came into the hands of a constable, take from the latter property first levied on by the latter.—DERRICK v. STATE, Ark., 30 S. W. Rep. 760.

26. BANKS AND BANKING—Insolvency of Collecting Bank.—A bank received a note for collection and remittance, but, instead of remitting as directed, credited its correspondent with the proceeds, and shortly thereafter failed. At the time of failure the cash on hand was less than the amount of the collection, but the receiver realized from the assets sufficient to pay all preferred claims. There was no proof that the proceeds of the note formed part of the assets converted into money by the receiver: Held, that the lien on the assets of the bank for the trust funds converted was limited to the amount of cash on hand at the time of the failure, the presumption of law being it was the residuum of the the trust money.—BOONE COUNTY NAT. BANK v. LATIMER, U. S. C. C. (Mo.), 27 Fed. Rep. 67.

27. CARRIERS — Delivery— Bill of Lading.—Bills of lading are symbols of property, and, when properly indorsed, operate as a delivery of the property itself, investing the indorsees with the constructive custody, which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same.—UNION PAC. RY. CO. v. JOHNSON, Neb., 63 N. W. Rep. 144.

28. CARRIERS OF GOODS—Failure to Furnish Cars.—Inability of a railroad to furnish cars contracted for, owing to an unexpected increase in its volume of business, is no defense for breach of such contract.—GULF, C. & S. F. RY. CO. v. HODGE, Tex., 30 S. W. Rep. 829.

29. CHATTEL MORTGAGE—Validity.—A provision in a chattel mortgage given in trust for certain creditors, reserving to the mortgagor the right, with the consent of such creditors, to discharge the trustee in case he becomes unwilling or incompetent to carry out the trust, does not invalidate the instrument as to creditors, as giving the mortgagor control of the property.—MEYER BROS. DRUG CO. v. RATHER, Tex., 30 S. W. Rep. 812.

30. CONSTITUTIONAL LAW—Committing Witnesses.—Section 61, ch. 82, Gen. St. 1889, by which an examining magistrate is authorized to commit to prison a witness who refuses to enter into a recognizance with or without sureties for his appearance as a witness, is not unconstitutional, as being in violation of the fifth article of the amendment of the constitution of the United States.—IN RE PETRIE, Kan., 40 Pac. Rep. 118.

31. CONSTITUTIONAL LAW—Gaming. — Rev. St. 1893, ch. 38, div. 8, which authorizes the issuance of search warrants for the recovery of stolen property, counterfeit coin, obscene literature, lottery tickets, and gaming apparatus, which provides that such property, if found, and the person in whose possession they are found, shall be brought before the judge or justice who issued the warrant, and which directs that such property shall be kept so long as is necessary for the purposes of the trial, and that "as soon as may be afterward all such stolen property shall be restored to the owner thereof, and all the other things seized by virtue of such warrants shall be burnt or otherwise destroyed under the direction of the judge, justice or the court," is not unconstitutional as depriving persons of property without due process of law.—GLENNON v. BRITTON, Ill., 40 N. E. Rep. 594.

32. CONTEMPT PROCEEDINGS— Reviewed by Certiorari.—Where in contempt proceedings the penalty imposed is for the benefit of a party, the order is appealable, and *certiorari* will not lie to review it; but, where the punishment is for a criminal contempt,—that is, one where the penalty is imposed solely to vindicate the authority of the court,—the order is not appealable, and it can be reviewed by *certiorari*.—STATE v. WILLIS, Minn., 63 N. W. Rep. 169.

33. CONTRACT—Action for Wages—Services.—Where the services sued for were rendered by plaintiff while she was a member of the family of defendant, who was her cousin, it is proper to instruct the jury that they are authorized to find whether there was a contract, express or implied, to pay the plaintiff's services.—HEFFRON v. BROWN, Ill., 40 N. E. Rep. 583.

34. CONTRACT—Breach.—The making of payments on a building contract without objection, after the time specified for the completion of the work, is a waiver of any claim for damages, except as against the unpaid balance, for failure to finish the work within the stipulated period.—BRODECK v. FARNUM, Wash., 40 Pac. Rep. 189.

35. CONTRACT—Breach—Damages.—One who, in consideration of the assignment to him of a half interest in an invention, agrees to pay the costs of procuring a patent and manufacturing the machines, will not, upon his refusal to pay such costs, become liable for the full value of the invention, or for profits which the assignor could have realized from sales on the machine if it had been patented and manufactured.—HOLLIDAY v. BROSIG, Tex., 30 S. W. Rep. 841.

36. CONTRACTS—Consideration.—Where the defendant agrees to act as stakeholder for money due a contractor, and to pay the same to the subcontractor, and the person who is to pay the money refuses to accept the order, and the subcontractor draws a portion of the money direct, a subsequent agreement by defendant to pay the debt, under the belief that he was bound to do so by the first agreement, is without consideration.—SNEED & CO. IRON WORKS v. JEFFERSON, Ky., 30 S. W. Rep. 883.

37. CONTRACT—Order—Consideration.—An agreement not to file a lien on an owner's lot is a good consideration for his acceptance of an order.—LEVELL v. FROST, Mont., 40 Pac. Rep. 146.

38. CORPORATION—De facto Corporation.—A corporation created under the general law of this State for incorporating railroad companies can bind by mortgage or trust deed, executed to secure bonds issued by it to provide funds for constructing its railroad, future acquired property, as well as property owned by it at the time of the execution of the instrument. This being so, a corporation *de facto* can do the like.—MCTIGHE v. MACON CONST. CO., Ga., 21 S. E. Rep. 701.

39. CORPORATIONS—Election of Directors. — Const. 1870, art. 11, § 3, provides that "the general assembly shall provide by law that" in elections for directors or managers of incorporated companies every stockholder shall have the right to vote for the number of shares of stock owned by him, with certain rights as to cumulating his shares in order to vote for certain candidates, "and such directors or managers shall not be elected in any other manner:" Held, that a by-law of a railroad company allowing bondholders to vote for directors was void.—DURKEE v. PEOPLE, Ill., 40 N. E. Rep. 626.

40. CORPORATIONS— Fraud — Stockholders. — Where the directors of a corporation, by gross negligence in the management of the corporation, wreck it, the stockholders may sue the directors for damages without first suing to set aside apparently valid incumbrances created through the connivance of such directors.—LANDIS v. SEA ISLE CITY HOTEL CO., N. J., 31 Atl. Rep. 755.

41. CORPORATIONS—Insolvency.—On an issue as to the insolvency of a corporation, testimony of a notary that he had protested its commercial paper for nonpayment is admissible.—MISH v. MAIN, Md., 31 Atl. Rep. 799.

42. CORPORATIONS — Similarity of Names.—Rev. St. 1893, ch. 32, § 2, which forbids the incorporation of two companies having the same name, does not prevent the incorporation of both "The Elgin Butter Company" and "Elgin Creamery Company."—ELGIN BUTTER CO. v. SANDS, Ill., 40 N. E. Rep. 616.

43. CORPORATIONS—Validity of Contract.—A contract whereby the officers of an insolvent corporation, for the purpose of avoiding dissolution, transferred all its property to another corporation which had been organized to continue its business, and accepted in payment shares of stock in the corporation, which were to be held by trustees named by such officers, was void, in the absence of a provision of the charter expressly authorizing such a transaction.—BRYNE v. SCHUYLER ELECTRIC MANUF'G Co., Conn., 31 Atl. Rep. 833.

44. COUNTIES — Allowance of Claims.—Under Laws 1893, p. 292, providing that any person may appeal from a decision of the county commissioners, and that the "party appealing" shall serve notice, etc., persons interested in a claim, who feel aggrieved by the decision of the commissioners, only can appeal and not taxpayers generally.—MORATH v. GORHAM, Wash., 40 Pac. Rep. 129.

45. COUNTY—Implied Contract.—Where a county officer takes dirt from private premises, for a public purpose, without permission of the owner, the owner of the land, waiving the tort, may sue the county commissioners for the value of the dirt.—BOARD OF COM'RS OF RUSH COUNTY v. TREES, Ind., 40 N. E. Rep. 535.

46. COURTS—County Court—Holding Court in Another County.—Under Rev. St. 1893, ch. 37, § 215*a*, which provides that the county judges of the several counties, "with like privileges as the judges of the circuit courts," may "interchange with each other, hold court for each other, and perform each other's duties," when necessary or convenient, a county judge of one county may hold court in another county at the same time that the county judge of the latter county is holding another branch of the court there.—PIKE v. CITY OF CHICAGO, Ill., 40 N. E. Rep. 567.

47. COURTS—Jurisdiction.—Under Const. art. 14, §§ 1, 2, and Act Va;, 1785, "concerning the erection of the district of Kentucky into an independent State," the Circuit Court of a county in Indiana has jurisdiction of a suit for the wrongful killing of one opposite that county, on that part of the Ohio river which is the southern boundary of Indiana.—MEMPHIS & C. PACKET Co. v. PIKEY, Ind., 40 N. E. Rep. 525.

48. CRIMINAL EVIDENCE—Larceny.—The well estab lished rule that independent facts, discovered in consequence of a constrained confession made by a prisoner, are admissible in evidence against him, is of force in this State, unless it appears that criminal violence was used in procuring the confession or making the discovery. And, where such independent facts are admissible, so much of the prisoner's acts and declarations as are necessary to account for the discovery and explain the manner of it are admissible also, but solely for this purpose. They count for nothing as confessions, and, as such, are to be wholly disregarded. —RUSHER v. STATE, Ga., 21 S. E. Rep. 393.

49. CRIMINAL EVIDENCE—Murder—Handwriting.—On a trial for murder, an anonymous letter threatening violence to deceased, found on him after the killing, and shown to have been in his possession two or three weeks before that time, was, when proved to be in defendant's handwriting, proper evidence to be considered in determining whether the killing was due to malice, even though such killing had been shown to be the result of a quarrel between defendant and the deceased a few days before the act was committed.—KARR v. STATE, Ala., 17 South. Rep. 328.

50. CRIMINAL EVIDENCE—Robbery.—On a trial for robbery, it was not error, as compelling defendant to testify against himself, to admit evidence of his identification by witnesses before whom he had been taken, as the person whom they saw near the place of the crime on the evening it was committed.—LAND v. STATE, Tex., 30 S. W. Rep. 788.

51. CRIMINAL LAW — Assault from Ambush.—In a trial for assault from ambush, complainant testified that, after he had been ordered from defendant's premises, he saw the latter come out, and point to a place near by, from which he inferred that it was defendant's intention to go there and shoot him. Complainant ran home, returned with a gun, and searched for defendant, but, before he discovered his hiding place, was himself shot, recognizing defendant as his assailant by the flash of the gun: Held, not an assault made in a "secret manner."—STATE v. GUNTER, N. Car., 21 S. E. Rep. 674.

52. CRIMINAL LAW—Embezzlement.—A bailee appropriating money intrusted to him by a thief is guilty of embezzling the same from the thief.—STATE v. LITTSCHKE, Oreg., 40 Pac. Rep. 167.

53. CRIMINAL LAW—Forgery.—It is forgery to sign a check of apparent legal efficiency in an assumed or fictitious name, if done with intent to defraud the payor.—STATE v. VINELAND, Mont., 40 Pac. Rep. 178.

54. CRIMINAL LAW—Forgery—Name of Fictitious Person.—The signing of a fictitious name to an instrument, with a fraudulent intent, constitutes forgery.—HOCKER v. STATE, Tex, 30 S. W. Rep. 783.

55. CRIMINAL LAW—Former Jeopardy.—A conviction of assault with a deadly weapon will not support a plea of former conviction in a trial for carrying a concealed weapon.—STATE v. ROBINSON, N. Car., 21 S. E. Rep. 701.

56. CRIMINAL LAW—Homicide.—A murder not perpetrated by means of poison, lying in wait, or torture, nor in the perpetration of, or attempt to perpetrate, arson, rape, robbery, or burglary, can only become murder in the first degree by being willful deliberate, and premeditated. An instruction which ignores these conditions, and informs the jury that if they find that the defendant unlawfully, and with malice aforethought, killed the deceased, their verdict must be murder in the first degree, is erroneous.—STATE v. WONG FUN, Nev., 40 Pac. Rep. 95.

57. CRIMINAL LAW—Homicide—Aiding and Abetting. —In a trial for murder, an instruction that if defendant was present for the purpose of actual assistance as the circumstances might demand, and the principal was encouraged to take the life of the deceased by the presence of defendant, then defendant aided and abetted in the killing of the deceased, is properly given.—SINGLETON v. STATE, Ala., 17 South. Rep. 327.

58. CRIMINAL LAW—Homicide—Self-Defense.—On an issue that defendant produced the occasion with a view of having deceased killed, or killing him himself, and that he had not abandoned the difficulty at the time deceased was killed, a charge "that a party, unlawfully and violently attacked, such an attack would not justify homicide if the party killing had provoked the difficulty with the intent to kill his assailant, or had voluntarily engaged in a difficulty with the person killed," is correct.—BURRIS v. STATE, Tex., 30 S. W. Rep. 785.

59. CRIMINAL LAW—Indecent Assault.—Where it appears from the evidence in a prosecution under 3 How. Ann. St. § 9314*b*, for assaulting a female child under 14 years of age, and taking improper liberties with her person, that, while defendant put his arm around her waist, he did not take any liberties, an instruction that he might be convicted of an assault is error.—PEOPLE v. SHEFFIELD, Mich., 63 N. W. Rep. 65.

60. CRIMINAL LAW — Instructions.—Where the evidence is mainly circumstantial, and no special charge was asked applying the doctrine of reasonable doubt to any particular fact, and the circumstances do not call for any special charge relating thereto, a correct general charge on reasonable doubt is sufficient.—CARSON v. STATE, Tex., 30 S. W. Rep. 799.

61. CRIMINAL LAW — Jurisdiction.—The offense of larceny from the person was committed above an island on a wagon bridge, which crosses the Mississippi river between Wisconsin and Minnesota. The island is on the Wisconsin side of the main channel of the river, is separated from the Wisconsin shore by non-navigable water, is subject to overflow, is submerged about four months in the year, is crossed by said bridge, which

rises above high water mark, is a permanent structure, and is suported by piles driven into the soil of the island: Held, the State of Minnesota and its courts have jurisdiction over said offense.—STATE v. GEORGE, Minn., 63 N. W. Rep. 100.

62. CRIMINAL LAW—Justifiable Homicide.—To reduce homicide in self defense to excusable homicide, it must be shown that the slayer was closely pressed by the other party, and retreated as far as he conveniently or safely could, in good faith, with the honest intent to avoid the violence of the assault.—STATE v. ZEIGLER, W. Va., 21 S. E. Rep. 763.

63. CRIMINAL LAW—Larceny—Evidence.—In a prosecution for larceny, if the owner of the property alleged to have been stolen is examined as a witness upon the trial, his testimony that he did not consent to the taking of the property is indispensable to a conviction.—PERRY v. STATE, Neb., 63 N. W. Rep. 26.

64. CRIMINAL—Murder.—Under Pen. Code, art. 590, providing that when one, in the execution of a felony, shall kill another, though without an apparent intention to kill, the offense is not negligent homicide, and article 47, providing that if one, intending to commit a felony, and in the act of executing the same, shall through mistake or accident, do another act, which, if voluntarily done, would be a felony, he shall receive the punishment affixed by law to the offense actually committed. If A shoots at B, intending to unlawfully kill him, but unintentionally kills C, A is guilty of murder.—RICHARDS v. STATE, Tex., 30 S. W. Rep. 805.

65. CRIMINAL LAW—New Trial.—An affidavit for a new trial on the grounnd of newly-discovered evidence must state facts showing the materiality of the evidence, a mere allegation that it is material being insufficient, and must also aver that the same is believed to be true, and that it has been discovered since the trial.—RUSSELL v. STATE, Ind., 40 N. E. Rep. 666.

66. CRIMINAL LAW—Right to Bail.—A mistrial, because of a disagreement of a jury as to a capital offense, does not furnish the accused the absolute right to give bail. That fact, coupled with other circumstances, simply affords proper matter for the court to consider in exercising its discretion as to whether or not it will admit to bail.—EX PARTE VICKERS, La., 17 South. Atl. Rep. 296.

67. CRIMINAL PRACTICE—Obscene Publications—Indictment.—When an indictment, under article 343, Pen. Code, which makes indecent publications a criminal offense, fails to show on its face that the published matter was obscene or indecent, it will not sustain a conviction.—ABENDROTH v. STATE, Tex., 30 S. W. Rep. 787.

68. CRIMINAL PRACTICE — Record of Conviction. — Where one indicted for murder in the first degree was convicted of murder in the second degree, and the clerk inadvertently entered in the record that he was found guilty as charged, instead of guilty of murder in the second degree, the court could, during the term, order the clerk to correct the error, without first requiring the presence of defendant.— STATE v. MCNAMARA, Ark., 30 S. W. Rep. 762.

69. CRIMINAL TRIAL—Cross-examination.— Although the cross-examination of the witness for the State is closed, the defendant's counsel should be allowed to question the witness as to contradictory statements by him, so as to afford the basis to introduce proof of such statement, and thus impeach the witness' credit; the witness being at hand and on the stand, and the exercise of the right claimed on behalf of the prisoner operating no delay or injury to the State.—STATE v. NIXON, La., 17 South. Rep. 303.

70. DECEIT.—In an action to recover damages for alleged false representations or fraud and deceit practiced upon plaintiff, by reason of which it is claimed he was induced to part with property (in this case a farm) at a price greatly below its real value, and thus damaged, it devolves upon the party pleading the fraud and deceit to show that he was influenced by the deceit, and thereby induced to make such disposal of his property.—MCCREADY v. PHILLIPS, Neb., 63 N. W. Rep. 7.

71. DEED— Assumption of Mortgage. — An alleged agreement to pay an existing mortgage, as part of the consideration for the conveyance of mortgaged premises, is not established by recitations in the deed of conveyance that such deed is subject to said mortgage, nor a mere recitation that said mortgage is part of the consideration or purchase price.—GREEN v. HALL, Neb., 63 N. W. Rep. 119.

72. DEED—Condition Subsequent.—In response to a resolution of a city council, directing a lease "for public use" with the right reserved "to purchase," certain land described in the resolution was conveyed to the city by two deeds. The first conveyed a portion of the land with a *habendum* clause, stating that it was to be held by the city "as and for a street, to be kept as a public highway;" and the second, after setting out the resolution, leased to the city, with the right reserved to purchase in fee, all the ground mentioned in the resolution, except that which had been granted by the prior deed to the city in "fee-simple." All the land thus conveyed was used by the city for a public park: Held, that the *habendum* clause of the first deed did not create a condition subsequent so as to work a forfeiture in case the property was not maintained as a public street.—KILPATRICK v. MAYOR, ETC. OF BALTIMORE, Md., 31 Atl. Rep. 805.

73. DEED—Delivery.—A man executed a deed conveying land to his nieces and nephews, some of whom were minors, and gave it to his partner, telling him to take care of it. The partner kept the deed until after the grantor died. The grantor at the same time executed and delivered a lease of the property, in which lease the grantees in the deed were recognized as the owners of the land: Held, that the deed was duly delivered.— MILLER v. MEERS, Ill., 40 N. E. Rep. 577.

74 DEED—Duress.—A deed executed during the duress of the grantor is not void but voidable only.—COMMERCIAL NAT. BANK OF CLEVELAND v. WHEELOCK, Ohio, 40 N. E. Rep. 636.

75. DEED—Husband to Wife.—A deed from a husband to his wife for real estate, while inoperative and void at law, is nevertheless valid in equity, and will confer upon the wife a good equitable estate, which in all cases will be enforced against the husband by a court of equity.—COSNER v. MCCRUM, W. Va., 21 S. E. Rep. 739.

76. DEED—Parol Evidence.—Where the description in a deed is free from ambiguity, parol evidence is not admissible to show that the premises in controversy were intended to be included therein.—ELOFRSON v. LINDSAY, Wis., 63 N. W. Rep. 89.

77. DEED—Rule in Shelley's Case.—A deed giving land to persons "during their natural lives, and at their death to the heirs of their body," gives the grantee a fee-simple.—WATERS v. LYON, Ind., 40 N. E. Rep. 662.

78. DEED OF GIFT—Construction.—A deed by E S, of the first part, and S S, "his wife, and her heirs, named on the back of the deed," of the other part, conveyed to the wife and her "children" certain land. The deed was executed for the purpose of providing for the grantor's family, a life estate being reserved by him. On the back of the deed, after the indorsement of the names of the children, was indorsed the provision that, if the wife had any other children, they should have an equal share with the above "heirs:" Held, that the wife and children took a fee-simple.—HELMS v. AUSTIN, N. Car., 21 S. E. Rep. 556.

79. DESCENT—Rights of Heirs.—Under Sayles' Civ. St. art. 1652, providing that where a part of intestate's relations in the first and same degree are dead, and a part alive, the descendants of the former shall inherit only such portion of the estate as their parents would be entitled to, if alive, a grandchild takes *per stirpes*, and his share may be charged with a debt due the estate from his deceased parent.—POWERS v. MORRISON, Tex., 30 S. W. Rep. 849.

80. DESCENT—Rights of Heirs—Debts of Ancestor.—A grandchild inheriting *per stirpes*, under 1 Sayles' Civ. St. art. 1652, is entitled to recover his full share of the estate without accounting for a debt due by his deceased insolvent father to the intestate grandfather.—POWERS V. MORRISON, Tex., 30 S. W. Rep. 851.

81. EJECTMENT—Cotenant as Plaintiff.—One cannot recover as sole plaintiff in ejectment the interests of both himself and his cotenants.—MARSHALL V. PALMER, Va., 21 S. E. Rep. 672.

82. ELECTIONS AND VOTERS—Ballots.—Some discretion is conferred upon the officer charged with the preparation of the official ballot, such as the arrangement thereon of party names, and in other respects not inconsistent with the spirit and purpose of the law; and the exercise of such discretion will not be controlled by the court.—WOODS V. MCNERNEY, Neb., 63 N. W. Rep. 23.

83. ELECTION OF REMEDIES.—Where the holder of a note which is secured by a lien on land, and which has been assumed by a purchaser of such land, has elected to sue the maker and foreclose the lien, he is thereby estopped to sue such purchaser on his contract assuming the note, to recover a balance left unpaid after the sale of the land.—WARD V. GREEN, Tex., 30 S. W. Rep. 864.

84. EMINENT DOMAIN—Damages.—The refusal of the court to allow a reversioner, upon his application, to be made a party defendant in a suit brought by the holder of the life estate against a city for damage to the land caused by the widening of a street, was error, although such reversioner had refused to join in the suit at request of the plaintiff.—JONES V. CITY OF ASHEVILLE, N. Car., 21 S. E. Rep. 691.

85. EMINENT DOMAIN—Franchise.—Act 1894, ch. 162, authorizing a street railway company to acquire by condemnation an easement in the roadway of a turnpike company, for the operation of its railway, is not unconstitutional, in that it violates the obligation of contracts, as corporations hold their franchises subject to the right of eminent domain.—PRESIDENT, ETC. OF BALTIMORE & F. TURNPIKE ROAD V. BALTIMORE, C. & E. M. P. R. CO., Md., 31 Atl. Rep. 854.

86. EQUITY—Jurisdiction.—Equity has no jurisdiction to avoid multiplicity of suits, of a suit to recover the several amounts due on a contract whereby defendants, in consideration of the assignment of the plaintiffs' several interests in an option on a mine, were to refund to each plaintiff the amount already advanced by him to develop the mine.—VAN AUKEN V. DAMMEIER, Oreg., 40 Pac. Rep. 89.

87. ESTOPPEL IN PAIS.—A party who by his acts, declarations, or admissions, or by failure to act or speak under circumstances when he should do so, either designedly or with willful disregard of the interests of others, induces or misleads another to conduct or dealings which he would not have entered upon but for this misleading influence, will not be allowed afterwards to come in and assert his right to the detriment of the person so misled.—NORFOLK & W. R. CO. V. PERDUE, W. Va., 21 S. E. Rep. 755.

88. EVIDENCE — Copy of Deed.—An office copy of a deed improperly admitted to record is not competent evidence.—CLARK V. PERDUE, W. Va., 21 S. E. Rep. 735.

89. EXECUTION — Return.—A description in the officer's return, order of sale, advertisement, and deed, of land levied upon, as "the N. E. part of S. E. 1-4 of S. E. 1-4" of a certain section, is insufficient to designate the land, and the sale and deed are void, beyond the power of equity to cure.—TATUM V. CROOM, Ark., 30 S. W. Rep. 885.

90. FEDERAL COURTS — Jurisdiction.—A statute of Indiana (Rev. St. Ind. 1881, § 2442; Rev. St. 1894, § 2597) provides that "the heirs, devisees and distributees of a decedent shall be liable, to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid:" Held, that the liability of two or more heirs, devisees, or distributees of a decedent under this statute is several, and not joint, and, although another statute provides that they may be jointly sued, the United States Circuit Court has no jurisdiction of a suit against them unless the liability of each exceeds $2,000.—BUSEY V. SMITH, U. S. C. C. (Ind.), 67 Fed. Rep. 13.

91. FEDERAL COURTS—Practice—Production of Books and Papers.—The right given by Rev. St. § 724, to compel the production of books and papers in action at law, is not limited to requiring their production at the trial, but the court may, in its discretion, grant an order for inspection, with permission to copy, prior to the date of the trial.—LUCKER V. PHOENIX ASSUR. CO. OF LONDON, U. S. C. C. (S. Car.), 67 Fed. Rep. 18.

92. FEDERAL COURTS — Supreme Court—Denial of Rights under Federal Constitution.—When the ground of jurisdiction is the alleged denial of a title, right, privilege, or immunity, secured by the constitution or laws of the United States, it must appear that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way; and cannot be recognized as properly made, when set up for the first time in a petition for rehearing after judgment.—SAYWARD V. DENNY, U. S. S. C., 15 S. C. Rep. 777.

93. FORECLOSURE — Interest.—Where interest on a mortgage debt is evidenced by interest notes, and, on failure to pay one of them, the entire debt is declared due, and the mortgaged foreclosed, the decree may include interest on the principal note from the date of the last matured interest note up to the date of the decree, but no damages should be computed on the interest due.—GUIGNON V. UNION TRUST CO., Ill., 40 N. E. Rep. 556.

94. FRAUDS—Statute of—Sale of Goods.—Where one orally contracting to buy goods, on being told by the seller to take them, directs a third person to do so, the latter, upon doing so, is not liable for their value to the seller, his receipt of the goods having the effect of taking the contract of sale out of the statute of frauds.—MOORE V. HAYS, Ind., 40 N. E. Rep. 688.

95. FRAUDULENT CONVEYANCES. — Where a sale of goods is not followed by an actual and continued change of possession, the presumption is that the sale was made with the intention of hindering, delaying, or defrauding creditors of the vendor, and in a contest with such creditors the burden is on the vendee to prove that he purchased in good faith and for value.—SNYDER V. DANGLER, Neb., 63 N. W. Rep. 20.

96. FRAUDULENT CONVEYANCE.—Where the plaintiff in an action for the wrongful seizure of property alleged possession, without setting out the nature of his title, an answer alleging that his only title was by reason of a deed of trust, and asserting that such deed was fraudulent against unpreferred creditors, and had been altered after delivery, should be construed as an attack on plaintiff's title only in the particulars so pointed out; and proof of delivery and acceptance of the deed was not necessary to plaintiff's recovery.—SONNENTHEIL V. TEXAS GUARANTY & TRUST CO., Tex., 30 S. W. Rep. 945.

97. FRAUDULENT CONVEYANCE—Chattel Mortgage.—Where the vendee or mortgagee of chattels takes immediate possession, and continuously retains possession, in a contest between such vendee or mortgagee and creditors of the vendor or mortgagor, the burden of proof is on the creditors to show both a fraudulent intent on the part of the vendor or mortgagor and participation therein on the part of the vendee or mortgagee.—PLUMER V. BENNETT, Neb., 63 N. W. Rep. 14.

98. FRAUDULENT CONVEYANCE—Homestead.— Where a debtor conveys his homestead to his mother, in consideration of a debt due her, and she conveys it to the latter's wife, there being no actual intent to defraud, a creditor who has the deeds set aside can only sell the property subject to the wife's homestead and the

mother's lien for her debt.— FIRST NAT. BANK OF PEORIA v. RHEA, Ill., 40 N. E. Rep. 551.

99. GUARANTY.—One who offers to guaranty the debt of a third person, to be contracted in the future, is not bound thereby unless the offer is accepted, and notice of such acceptance is given him within a reasonable time, in the absence of excuse for failure to give such notice.—FARMER'S BANK v. TATNALL, Dela., 31 Atl. Rep. 879.

100. GUARANTY—Consideration.—It is not necessary that the written memorandum of a "special promise to answer for the debt of another" should expressly state the consideration for the promise. It is sufficient if, from the whole writing, it appears with reasonable clearness what the consideration was; as, for example, to procure credit for a third party from the promisee. —STRAIGHT v. WIGHT, Minn., 63 N. W. Rep. 105.

101. HIGHWAYS—Dedication by Plat.—Where a person surveys and plats his land into blocks, lots, streets, and alleys, all the lines upon such plat represent the intent of the owner, and the meaning expressed by such lines should be deemed as effectual as that of the words or language found thereon.—GREAT NORTHERN RY. CO. v. CITY OF ST. PAUL, Minn., 63 N. W. Rep. 96.

102. HUSBAND AND WIFE—Necessaries Purchased by Wife.—The evidence in an action to recover from a husband for necessaries sold to a wife showed that she had, for several years prior to the purchase of the goods sued for, run bills at different stores, including plaintiff's, and that the husband had paid them regularly without objection. It was shown that, prior to the beginning of the bill in controversy, defendant had ordered his wife not to purchase goods from the plaintiff on credit, but his claim that he so notified plaintiff was expressly contradicted: Held, that the evidence was sufficient to sustain a verdict for plaintiff.—WATTS v. MOFFETT, Ind., 40 N. E. Rep. 533.

103. HUSBAND AND WIFE—Wife's Separate Property. —The only test of the paraphernality of the title of a married woman, during the existence of the community, is to be found in proof of the existence, origin, and investment of her paraphernal funds, under her separate administration and control. — ROUYER v. CARROLL, La., 31 Atl. Rep. 292.

104. INJUNCTION— Relief against Execution.—An injunction will not be granted to restrain the sale of land under an execution against another.—BOSTIC v. YOUNG, N. Car., 21 S. E. Rep. 552.

105. INJUNCTION BOND.—In an action on an injunction bond for attorney's fees incurred in procuring the dissolution of the injunction, an allegation in the complaint that the judgment dissolving the injunction had been in all things affirmed by the Supreme Court, is a sufficient averment to withstand a demurrer on the ground that the 60 days allowed for a petition for a rehearing after the affirmance of the cause in the Supreme Court had not expired. — RHODES-BURFORD FURNITURE CO. v. MATTOX, Ind., 40 N. E. Rep. 545.

106. INSANITY—Question for Jury. — Where there is evidence that a grantor was insane when he executed a deed, his mental condition is a question of fact for the jury, and it is error to instruct that the law presumes that he was sane.—ROGERS v. ARMSTRONG CO., Tex., 30 S. W. Rep. 848.

107. INSURANCE — Application — Incumbrances.— A judgment with waiver of exemptions, is a lien, within the meaning of a representation in an application for insurance that there were no liens or mortgages on the property.—CAPITAL CITY INSURANCE CO. v. AUTREY, Ala., 17 South. Rep. 326.

108. INSURANCE—Contract.—A contract of insurance entered into by one acting as agent for both the insurer and insured may be avoided by either party if, at the time of the contract, he did not know of such person's agency for the other party, or has not, with a full knowledge of the facts, ratified it. — BRITISH-AMERICAN ASSUR. CO. v. COOPER, Colo., 40 Pac. Rep. 147.

109. INSURANCE—Proofs of Loss.—Under a fire insurance policy providing that in case of loss the assured shall give immediate notice, and render a particular account thereof to the company, reasonable diligence is required in making proof of loss; and, where such proof was made over four months after a fire, and there was nothing in the pleadings to show that it could have been made sooner, the question of reasonable time was for the jury.—CAREY v. FARMERS' & MERCHANTS' INS. CO., Oreg., 40 Pac Rep. 91.

110. INTERPLEADER—Appeal.—An order dismissing a bill of interpleader was reversed by the appellate court, and the cause remanded, with directions to the Circuit Court to permit the complainant to pay the money held by it into court, to order the defendants to interplead therefor, and to enjoin the defendants from suing the complainant: Held, that such order was a final judgment, from which an appeal to the Supreme Court would lie.—PLATTE VALLEY STATE BANK v. NATIONALLIVE STOCK BANK, Ill., 40 N. E. Rep. 621.

111. INTOXICATING LIQUORS — Civil Damage Law.— The interest of a wife in the earning power of her husband is not property, within Act May 8, 1854, declaring that one unlawfully furnishing intoxicating drinks to another shall be liable for injury to "person or property" in consequence of the furnishing. She cannot, therefore, recover because of his imprisonment for an act committed while intoxicated.—BRADFORD v. BOLEY, Penn., 31 Atl. Rep. 751.

112. INTOXICATING LIQUORS — Constitutional Law.— Act May 6, 1893, § 7, regulating the sale of intoxicating liquors, providing that the payment of the United States special license tax shall be held to be *prima facie* evidence that the persons paying such tax are engaged in selling liquors, is not in conflict with Const. art, 1, § 15, giving the right of trial by jury.—FLOECK v. STATE, Tex., 30 S. W. Rep. 794.

113. JUDGMENT — Amendment—Laches.—The right of the court to correct the record entry of a judgment, and cause it to express the judgment actually rendered, is not lost by delay, unless the rights of the adverse party or of third parties would be prejudiced thereby.—BREENE v. BOOTH, Colo., 40 Pac. Rep. 193.

114. JUDGMENT — Appointment of Receiver.—Where one has acquired a judgment lien on the property of an insolvent corporation, his rights thereunder will not be affected by the subsequent appointment of a receiver before execution has been levied.—CHERRY v. WESTERN WASHINGTON INDUSTRIAL EXPOSITION CO., Wash., 40 Pac. Rep. 136.

115. JUDGMENT—Confession—Affidavit.—Rev. St. 1881, § 588, as amended by Rev. St. 1894, § 597, provides that, whenever a confession of judgment is made, the party confessing shall, at the time he executes such power or confesses judgment, make affidavit of the justice of the claim, and that confession is not made to defraud creditors: Held, that the failure of makers of notes to make the affidavit prescribed renders judgment on the notes erroneous.—BIBLE v. VORIS, Ind., 40 N. E. Rep. 670.

116. JUDGMENT—Res Judicata.—Where, in a suit for divorce, the bill shows that a former bill was filed for the same cause, and that such bill was dismissed by the complainant, but neither the pleadings nor the evidence shows whether any answer to the former bill was filed, or whether the dismissal was without prejudice or not, such former suit is not a bar to the second suit.—GERBER v. GERBER, Ill., 40 N. E. Rep. 581.

117. JUSTICE OF THE PEACE — Judgment.—Where the docket of a justice does not show the nature of the action, whether any pleas were made by the parties, nor any other facts showing jurisdiction, the judgment rendered is void.—JONES v. HUNT, Wis., 63 N. W. Rep 81.

118. LANDLORD AND TENANT.—A landlord, by accepting without objection the possession of leased premises, may be deemed to have waived such right as otherwise he might have had to insist upon notice of

his tenant's intention to quit, even though before such acceptance of possession the landlord had notified the tenant that he would insist upon such notice.—ELGUTTER v. DRISHAUS, Neb., 63 N. W. Rep. 19.

119. LANDLORD AND TENANT—Default in Rent.—In an action against a tenant to recover rent due or possession of the premises, a complaint alleging the terms of the lease, and tenant's failure to pay the rent which fell due prior to the date of demand, states a good cause of action, although it shows that the full amount claimed was not due at the time demand therefor was made.—KNOWLES v. MURPHY, Cal., 40 Pac. Rep. 111.

120. LANDLORD AND TENANT — Mortgage of Leasehold Interest.—A mortgage of a leasehold estate by a lessee upon whom the lease confers the privilege to purchase the premises, partly on credit, at a price named, at any time during the term, does not convey to the mortgagee the right to sell such privilege of purchase.—MENGER v. WARD, Tex., 30 S. W. Rep. 853.

121. LANDLORD AND TENANT — Rights of Tenant.—A tenant for years of mortgaged land planted a crop after the rendition of a decree foreclosing the mortgage, the tenant having been a defendant in the foreclosure suit. The land was sold under the decree, and the sale confirmed while the crop was growing, and before it matured. The purchaser did not obtain possession of the land, but permitted the tenant to retain possession, merely notifying him that he, the purchaser, would expect from the tenant rent in money or in kind: Held that, as between the tenant and the purchaser, the former was entitled to the crop.—MUNDAY v. O'NEIL, Neb., 63 N. W. Rep. 32.

122. LANLDORD AND TENANT—Structures Erected by Tenant.—Where owners of land dispossess a tenant, and, pending suit against them by him for possession of the land, rent the premises to a second tenant, the fact that the second lease is made terminable upon the ending of the suit will not affect the rights of the second lessee to structures placed upon the land by him, and which are, by express contract, his property.—WRIGHT v. MACDONELL, Tex., 30 S. W. Rep. 907.

123. LANDLORD AND TENANT — Surrender of Lease—Acceptance.—A lessee removed before the expiration of the term without notice, and left the key with a neighbor for the lessors. The lessors notified the lessee that he would be held for the rent for the whole term unless the premises were re-rented, that they would try to re-rent the same, and that the lessee might aid in procuring a tenant; and the lessors thereupon placed the premises with a rental agent: Held, that there was no acceptance of a surrender of the premises.—LANE v. NELSON, Penn., 31 Atl. Rep. 864.

124. LANDLORD AND TENANT—Tenancy from Year to Year.—Where a tenant under a lease for years holds over, and the landlord thereafter accepts or demands rent, a tenancy from year to year is created, which may be terminated by 10 days' written notice to quit, in case of default in the payment of rent.—KLEESPIES v. MCKENZIE, Ind., 40 N. E. Rep. 648.

125. LANDLORD AND TENANT—Unlawful Detainer—Notice.—Where a lease contained a covenant prohibiting the lessee from subleasing the premises, and reserving the lessor's right to sell, a sublessee will be charged with notice of the terms of his lessor's lease.—SHANNON v. GRINDSTAFF, Wash., 40 Pac. Rep. 123.

126. LIBEL—Good Character.—Where, in an action for libel, defendant denied the publication, and also pleaded justification, the mere fact that plaintiff's reputation was shown to be good did not warrant a verdict in his favor.—AUTHIER v. BENNETT BROS. CO., Mont., 40 Pac. Rep. 182.

127. LIEN — Express Contract.—A certificate of acknowledgment: "On this day personally appeared Mrs. S. F., wife of E. F., known to me [proved to me on the oath of——] to be the person," etc., is sufficient, the penstroke through the blank showing that the words within brackets, all of which were printed, were not intended to be a part of the certificate. A clause in a contract to furnish labor and material, providing that "to secure the payment of said amount to said party of the second part, his heirs or assigns, this contract is entered into to fix the furnisher's and builder's lien," creates an express lien, which need not be recorded within the time required by statute for fixing a mechanic's lien.—PARRELL v. PALESTINE LOAN ASS'N, Tex., 30 S. W. Rep. 814.

128. MALICIOUS PROSECUTION.—A declaration in an action for malicious prosecution, which fails to state positively that the proceedings on which the action is based terminated in plaintiff's favor, is bad on demurrer.—COLLINS v. CAMPBELL, R. I., 31 Atl. Rep. 832.

129. MALICIOUS PROSECUTION—Probable Cause.—The waiver of a preliminary examination by a person charged with crime is *prima facie* evidence of probable cause.—BRADY v. STILTNER, W. Va., 21 S. E. Rep. 729.

130. MANDAMUS — Motion for New Trial — Death of Judge.—Where, pending an application to the Supreme Court for *mandamus* to compel a circuit judge to hear a motion, the judge resigns his office, the Supreme Court will take judicial notice of that fact, and refuse the writ.—PEOPLE v. MCCONNELL, Ill., 40 N. E. Rep. 608.

131. MANDAMUS—Title to Office.—Writ of *mandamus* is not the proper remedy to be issued upon the application of one claiming title to an office, where there are conflicting affidavits as to the essential facts, and there is a serious question raised as to relator's title to the office.—PEOPLE v. BRUSH, N. Y., 40 N. E. Rep. 502.

132. MANDAMUS—To City Officers.—A writ of *mandamus* will not issue to interfere with the performance of a duty dependent upon the judgment or discretion of the person to whom the performance of the duty is assigned.—STATE v. LATROBE, Md., 31 Atl. Rep. 788.

133. MARITIME LIENS—State Courts.—A State court has jurisdiction to enforce a lien on a vessel in operation upon navigable waters within the State, for labor and materials furnished in construction of such vessel, and before it so engaged in navigation.—LAKE NAVIGATION CO. v. AUSTIN ELECTRICAL STPPLY CO., Tex., 30 S. W. Rep. 882.

134. MARRIED WOMAN — Contracts—Consideration.—Where a married woman joined in a covenant with her husband that, as a part of the consideration for the sale of a business, they "severally agree and covenant that they will not, nor will either of them," engage in a certain business, she was a principal therein, and was personally bound thereby.—KOH I-NOOR LAUNDRY CO. v. LOCKWOOD, Ind., 40 N. E. Rep. 677.

135. MARRIED WOMAN—Power of Disposition.—Where land is deeded to one on the express trust that he hold it for a married woman as a *feme sole*, free from any debts of her husband, she cannot, in the absence of express power in the deed, convey it without the joinder of the trustee; at least, where it was deeded to the trustee prior to the adoption of Const. 1868, art. 10, providing that the separate property of a married woman may, with the assent of her husband, be conveyed by her as if she were unmarried, as, even if that presents the imposition of restrictions, in a deed of trust for a married woman, on her power of alienation, it does not affect a prior trust.—KIRBY v. BOYETTE, N. Car., 21 S. E. Rep. 697.

136. MASTER AND SERVANT — Assumption of Risk.—Plaintiff's decedent, a car repairer, whose duty it was to make repairs marked by the superintendent, was killed, while in the employ of defendant, by the negligence of the superintendent in failing to discover and mark defects in a car which he directed decedent to repair: Held, the defendant was liable, the danger not being one of the assumed risks of the employment.—G. H. HAMMOND CO. v. MASON, Ind., 40 N. E. Rep. 642.

137. MASTER AND SERVANT—Dangerous Employment.—It is the duty of an employer to inform an inexperienced servant of dangers ordinarily incident to the service; and if he fails therein, and the employee has no opportunity to learn of them, the latter will not be held to assume risks not obvious to one of his age,

experience, and judgment.—WOLSKI v. KNAPP, STOUT & Co., Wis., 63 N. W. Rep. 87.

138. MASTER AND SERVANT—Dangerous Machinery.—An agent of a corporation whose duty it is to provide employees with safe machinery, and who set an employee to work upon a defective machine, knowing it to be dangerous, is responsible for injuries sustained thereby.—GREENBERG v. WHITCOMB LUMBER CO., Wis., 63 N. W. Rep. 93.

139. MASTER AND SERVANT — Injury—Defective Appliances.—A railroad company is not liable where a car coupler becomes suddenly out of repair, if it has exercised reasonable care in providing a safe coupler, and in inspecting and keeping it in repair.—FENDERSON v. ATLANTIC CITY R. CO., N. J., 31 Atl. Rep. 767.

140. MASTER AND SERVANT— Negligence.—Plaintiff's decedent, a man 42 years of age, while in the employ of the defendant company, and working within a few feet of a high fence, was killed by the falling of a panel of such fence, which had been detached by taking up the posts, and placed by other employees of defendant in such a position that a slight wind would blow it down. It was shown that the decedent could have seen the condition of the panel of fence, and known his danger, by the exercise of ordinary care: Held, that plaintiff was not entitled to recover.—DIAMOND PLATE-GLASS CO, v. DEHORITY, Ind., 40 N. E. Rep. 681.

141. MECHANICS' LIENS. — What is known as the "mechanic's lien" on real estate and buildings is the creation of statute. It was unknown at common law, but the right given by statute to enforce it in a court of equity carries with it all the rights incident to that court's principles and rules and its methods of procedure.—UNITED STATES BLOWPIPE CO. v. SPENCER, W. Va., 21 S. E. Rep. 769.

142. MECHANIC'S LIEN — Community Property. — The husband may contract for the erection of buildings on the community real estate, so as to subject it to mechanic's liens therefor. — DOUTHITT v. MCCULSKY, Wash., 40 Pac. Rep. 186.

143. MECHANIC'S LIEN—Notice. — Under Const. art. 16, § 37, which provides that mechanics shall have a lien upon buildings for the value of the labor done or the material furnished therefor, and article 3170, Rev. St., which provides that such lien shall extend to such lot or lots upon which such houses are situated, or upon which such labor was performed, the lien exists independent of contract, and, therefore, if there appears enough in the notice to identify the property, it is sufficient.—MYERS v. HOUSTON, Tex., 30 S. W. Rep. 912.

144. MECHANIC'S LIEN — Separate Contract. — The mechanic's lien law of the State should not be so construed as to enable a material man to tack one contract to another, and procure a lien for all the material furnished under all the contracts by filing in the office of the register of deeds an itemized account of such material within four months of the date of furnishing the last item of material furnished in pursuance of the last contract.—CENTRAL LOAN & TRUST CO. v. O'SULLIVAN, Neb., 63 N. W. Rep. 5.

145. MECHANIC'S LIEN — Tools Rented for Moving House.—Tools rented for use in moving a house are tools used in the erection thereof, within the meaning of Act April 5, 1889, § 1, giving a lien to one who furnishes "tools to erect any house" under contract with the owner.—BURKE v. BROWN, Tex., 30 S. W. Rep. 936.

146. MINING CLAIM — Location.—A locator of a quartz mining claim, who has allowed his location to lapse and become subject to relocation, under Rev. St. U. S. § 2324, providing for the relocation of claims on which the required annual amount of work has not been done, has the right to make a new location, covering the same ground.—WARNOCK v. DE WITT, Utah, 40 Pac. Rep. 205.

147. MORTGAGE—Conflict of Law.—On the 13th day of March, 1886, in Cedar county, this State, O and wife executed and delivered a mortgage conveying lands in said county to D, a resident of Iowa, to secure a loan made by the latter, a loan broker, in the usual course of business: Held, in the absence of evidence explanatory of the transaction, the presumption is that the payment of the proceeds of the loan and the delivery of the note and mortgage were contemporaneous acts, and that the note is not an Iowa contract, although it appears from its face to have been executed in that State 12 days previous to the execution of the mortgage.—STARK v. OLSON, Neb., 63 N. W. Rep. 87.

148. MORTGAGE — Foreclosure—Priorities.—Where a mortgage of land and the crop growing thereon was not executed as a mortgage of a growing crop is required to be executed by Civil Code, § 2956, and the crop was subsequently mortgaged in good faith, in proceedings to foreclose the first mortgage the court should direct a separate sale of the crop, and the application of the proceeds thereof on the second mortgage.—SIMSON v. FERGUSON, Cal., 40 Pac. Rep. 104.

149. MORTGAGE — Foreclosure—Attorney's Fees.—A provision in a mortgage stipulating for attorney's fees, other than those expressly sanctioned by statute, is void.—KITTERMASTER v. BROSSARD, Mich., 63 N. W. Rep. 75.

150. MORTGAGE — Purchase-Money.—Where the owners of land incumbered by liens in excess of its value convey the land in consideration that the grantee pay the liens, and the grantee borrows from one of such lien holders money to pay all the liens but his own, and such lien holder takes a mortgage on the land from the grantee for the amount so advanced and the amount of his own lien, the mortgage is a purchase-money mortgage, so that under Rev. St. 1894, § 2656 (Rev. St. 1881, § 2495), the rights of the mortgagee are superior to those of the wife of the mortgagor, though she does not join in the mortgage.—BUTLER v. THORNBURGH, Ind., 40 N. E. Rep. 514.

151. MORTGAGE BY INSOLVENT—Preferential Assignment.—A mortgage, given by an insolvent debtor to a creditor, which is intended as security for his debt and not as a transfer of the property as a preference, is not invalid under Rev. St. 1893, § 2146, providing that an assignment by an insolvent debtor of his property, as a preference to any other creditor than the public, shall be void.—PORTER v. STRICKER, S. Car., 21 S. E. Rep. 635.

152. MORTGAGE FORECLOSURE — Validity of Sale.—A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the record discloses.—HOOPER v. CASLETTER, Neb., 63 N. W. Rep. 135.

153. MUNICIPAL BONDS — Provisions for Interest.—A city ordinance, in pursuance of which bonds are issued, providing for the payment of the interest and principal of the bonds, is a part of the contract between the city and the holder of the bonds.—BASSET v. CITY OF EL PASO, Tex., 30 S. W. Rep. 893.

154. MUNICIPAL CORPORATIONS—Changing Boundaries.—What the boundaries of a municipal corporation are, where they are, and whether a particular piece of territory lies within or without the corporate limits of a municipality are all matters for judicial determination; but the power to create municipal corporations and the power to enlarge or restrict their boundaries are legislative ones.—CITY OF HASTINGS v. HANSEN, Neb., 63 N. W. Rep. 34.

155. MUNICIPAL CORPORATION — Change of Street Grade.—A city which has changed the grade of a street is liable to the owners of property damaged by such change.—CITY OF JOLIET v. BLOWER, Ill., 40 N. E. Rep. 619.

156. MUNICIPAL CORPORATION — Constitutional Law—Annexation.—It is not a valid objection to the statute or to annexation under it, that a municipal corpora-

tion may be so annexed without the consent of its constituted authorities or of its inhabitants, nor that the taxable property within such municipality will become subject to taxation for the payment of previously incurred indebtedness of the city to which the annexation shall be made.—STATE v. CITY OF CINCINNATI, Ohio, 40 N. E. Rep. 508.

157. MUNICIPAL CORPORATION — Defective Sidewalks. —A person walking at night on a city sidewalk is only required to use ordinary care to avoid defects in the sidewalk, and is not required to remember the location of defects he may have seen during the day, and to use more than ordinary care to avoid injury therefrom.—RUSSELL v. TOWN OF MONROE, N. Car., 21 S. E. Rep. 550.

158. MUNICIPAL CORPORATION — Defective Street.—A municipal corporation is not an insurer against accidents upon streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, with ordinary care, by day or night; and whether so or no is a practical question to be determined in each case by its particular circumstances.—YEAGER v. CITY OF BLUEFIELD, W. Va., 21 S. E. Rep. 752.

159. MUNICIPAL CORPORATION — Defective Street — Contributory Negligence.—In an action for injuries received by reason of the dangerous condition of a street, the facts set forth in the special verdict must show that the negligence of defendant was the proximate cause of the accident and that there was no contributory negligence on the part of plaintiff.—CITY OF ELWOOD v. CARPENTER, Ind., 40 N. E. Rep. 548.

160. MUNICIPAL CORPORATION—Driving on Sidewalks. —Act March 3, 1859, entitled "An act for the protection of sidewalks in towns and villages," which declares it unlawful to drive on a sidewalk of any town or village, amended by Act March 9, 1867, entitled "An act to amend Act March 3, 1859, so as to protect sidewalks outside of towns and villages," which declares it unlawful to drive on any sidewalk by the side of any public highway, applies to sidewalks of a city street; the term "town" being generic, and inclusive of cities, and "highways" being inclusive of streets, and the only effect of the amendment is to extend the act to rural roads.—CITY OF INDIANAPOLIS v. HIGGINS, Ind., 40 N. E. Rep. 671.

161. MUNICIPAL CORPORATION—Ordinance.—An ordinance prohibited the sale of fresh meats without license within certain limits. A butcher doing business outside of these limits, in response to an order for fresh meats, delivered them, for a price agreed on, to the purchaser within the limits: Held, a sale in violation of the ordinance.—STATE v. WERNWAG, N. Car., 21 S. E. Rep. 683.

162. MUNICIPAL CORPORATION—Public Improvement —Waterworks.—Waterworks designed for the benefit of all the inhabitants of the municipality are not a "local improvement," within the meaning of Rev. St. 1893, ch. 24, art. 9, § 1, authorizing special assessments for local improvements.—VILLAGE OF MORGAN PARKS v. WISWALL, Ill., 40 N. E. Rep. 611.

163. MUNICIPAL CORPORATION—Revocable License.— Permission granted by a municipality to private parties to construct drains on highways amounts only to a revocable license.—EDDY v. GRANGER, R. I., 31 Atl. Rep. 831.

164. MUNICIPAL CORPORATION—Riparian Rights—Construction of Pier.—Permission by the city to a riparian lot owner to construct a pier may be revoked at any time before the pier is constructed.—CLASSEN v. CHESAPEAKE GUANO CO. OF BALTIMORE CITY, Md., 31 Atl. Rep. 808.

165. MUNICIPAL CORPORATION—Special Assessment— Collateral Attack.—Where the record of special assessment proceedings shows that notices were duly sent to property owners, the sending of such notices cannot be collaterally called in question.—WEST CHICAGO ST. R. CO. v. PEOPLE, Ill., 40 N. E. Rep. 605.

166. MUNICIPAL CORPORATION—Special Assessments— Confirmation.—Where separate objections to confirmation of a special assessment are filed by the owners of different lots, it is proper to enter separate judgments of confirmation.—ZEIGLER v. PEOPLE, Ill., 40 N. E. Rep. 607.

167. MUTUAL BENEFIT INSURANCE—Proceeds of Policy. —Where the constitution and by-laws of a mutual benefit association show that its object is to provide a fund for the benefit of families of deceased members, and the widow and heirs are recognized by provisions therein as the beneficiary class, and no provision is made therein for the assignment of policies, the widow and minor child of a deceased member are entitled to the proceeds of a policy providing that all payments due heirs of the insured under the policy "are payable to his mother or his lawful heirs," although the policy was delivered to his mother, and she has paid all the assessments thereon.—HANNA v. HANNA, Tex., 30 S. W. Rep. 820.

168. MUTUAL BENEFIT SOCIETY—Forfeiture — Reinstatement.—Where a policy in a mutual life insurance company has been forfeited by failure to pay the premiums upon the day fixed, and the holder has the right, upon certain terms, which he is able and willing to fulfill, to be relieved from his default, his remedy against the company is not by *mandamus*, but in a court of equity, for relief in the nature of specific performance. — BRADBURY v. MUTUAL RESERVE FUND LIFE ASSN., N. J., 31 Atl. Rep. 775.

169. NEGLIGENCE—Electric Light Company.—Plaintiff was a dishwasher in a restaurant, the wires to light which ran about sixty feet over the roof of the building at an average height of two feet. Plaintiff had seen the employees of defendant electric company placing the wires, and had been upon the roof in the daytime when the wires were in position. The night of the accident was stormy, and plaintiff, with his employer, went upon the roof, to secure the business signs of the latter. Plaintiff, not knowing or forgetting the location of the wires, came in contact with them: Held, that defendant was negligent in not raising the wires so high above the roof that those having occasion to go there would not come in contact with them.—GIRAUDI v. ELECTRIC IMP. CO. OF SAN JOSE, Cal., 40 Pac. Rep. 108.

170. NEGOTIABLE INSTRUMENT. — Where one invests the payee of a note with the apparent title to it, and a trust deed securing it, an indorsee of the note and deed will take them unaffected by any private agreement between the payee and maker.—TRAVELERS' INS. CO. v. REDFIELD, Colo., 40 Pac. Rep. 195.

171. NEGOTIABLE INSTRUMENT — Escrow.—Defendant executed two notes to plaintiff, in payment for certain shares of stock, and the notes and stock were deposited with a third person, under a written agreement whereby the notes were not to be delivered to payee until matured, nor stock delivered to purchaser until paid for: Held, such deposit of the notes was not a delivery in escrow.—GLENN v. HILL, Wash., 40 Pac. Rep. 141.

172. NEGOTIABLE INSTRUMENT — Indorsement. — An agreement in the following form: "For value received, we hereby guaranty payment of the within note at maturity, or any time thereafter waiving protest and notice of non-payment," held, not a mere guaranty, but an indorsement with an enlarged liability.—POLLARD v. HUFF, Neb., 63 N. W. Rep. 58.

173. NEGOTIABLE INSTRUMENT — Indorsement. — Where a negotiable note, indorsed by several, parties, residing at different places, is made payable at a bank in the city of H, and before maturity it is discounted by a bank in the town of C, and by the last named bank it is indorsed to a bank in the city of H for collection, and one of the indorsers resides in said city of H when said note matures and is presented for payment, and payment is refused, and the note is duly protested, the bank to which said note was indorsed for collection is only bound to give notice to the bank

in C, its immediate indorser.—BIG SANDY NAT. BANK v. CHILTON, W. Va., 21 S. E. Rep. 774.

174. NEGOTIABLE INSTRUMENT — Indorsement.— One who executes a promissory note as surety for another is not an accommodation maker. — PEORIA MANUF'G CO. v. HUFF, Neb., 63 N. W. Rep. 121.

175. NEGOTIABLE INSTRUMENT—Note—Answer Denying Execution.—In an action upon a written instrument, purporting to have been signed by the defendant, a special denial that the defendant signed the note in an answer verified on information and belief is not a denial under oath or affidavit, as contemplated by this statute, of the signature or execution of the instrument, so as to put the plaintiff, in the first instance, to the proof of its execution. — MCCORMICK HARVESTING MACH. CO. v. DOUCETTE, Minn., 63 N. W. Rep. 95.

176. NEGOTIABLE INSTRUMENT—Notes—Indorsement. —R, who held a note for sale with H's indorsement thereon in blank, promised the latter to erase his name before selling the note; and plaintiff, to whom the same was transferred, accepted it with knowledge of such agreement. By mistake the indorsement was not erased: Held, that these facts constituted a good defense to an action against H.—GREGG v. GROESBECK, Utah, 40 Pac. Rep. 202.

177. NEGOTIABLE INSTRUMENT — Release of Surety.— Where the makers of a note successfully defend an action thereon on the ground of failure of consideration, their discharge releases the surety, though judgment by default has been rendered against him in the same action.—MICHENER v. SPRINGFIELD ENGINE & THRESHER CO., Ind., 40 N. E. Rep. 679.

178. NOTARY PUBLIC — Certificate of Acknowledgment.—A notary public may correct a certificate of acknowledgment to a mortgage, after its execution, by inserting words to show that the parties were personally known to him.—HANSON v. COCHRAN, Dela., 31 Atl. Rep. 880.

179. PARTNERSHIP—Dissolution.—One who purchased a note made payable to a partnership, of which he had never heard, from a person claiming to be a member of such partnership, accepting it with the indorsement of the firm name by the alleged partner, without inquiry as to his authority or the existence of the partnership, was charged with notice of the prior dissolution of the firm, and the seller's consequent want of authority to sell the note.—BLANKS v. HALFIN, Tex., 30 S. W. Rep. 941.

180. PAYMENT—Note.—The fact that a note was received in payment of a debt may be proved from the circumstances surrounding the transaction, though there may have been no express agreement to that effect.—MACOMBER v. MACOMBER, R. I., 31 Atl. Rep. 753.

181. PLEADING—Set off—Warranty.—In an action on a note against two defendants, for horses sold to one of them, breach of warranty cannot be pleaded as a set off, being purely a matter of defense, and defendants cannot recover on such plea, beyond the amount of the note.—JOHNSON v. KELLEY, Vt., 31 Atl. Rep. 849.

182. PLEDGE — Bills of Lading — Transfer. — The indorsement by N of the words, "Deliver to order of J," on bills of lading made "to the order of N, notify J," and issued for goods shipped by N to himself as consignee, will not affect the rights of the A bank, to which N sent them, attached to a draft on J, payable to A's order; it being obvious that the delivery of them was intended as a pledge of the property mentioned in them as security for the sum advanced or paid on the draft.—RICHARDSON v. ATLAS NAT. BANK OF CHICAGO, Penn., 31 Atl. Rep, 740.

183. PRINCIPAL AND SURETY — Bond — Forged Signatures.—Where a bond, when delivered to the obligee, has signatures of obligors different from those that appear in the body of the bond, the sureties will be released, unless proof is made that they waived the defect.—SULLIVAN v. WILLIAMS, S. Car., 21 S. E. Rep. 642.

184. PRINCIPAL AND SURETY — Contribution.—Where one of two or more sureties discharges the debt of the principal debtor, by giving his individual note for part of the sum due, and money for the residue, which is received by the creditor as payment, and the evidence of the original debt surrendered, such surety is entitled to demand contribution from the other joint sureties, although the new note has not been paid.—SMITH v. MASON, Neb., 63 N. W. Rep. 41.

185. PRINCIPAL AND SURETY — Release of Surety.— Where an extension of the time of payment is given by the creditor to the principal debtor, held, the burden is on the surety to prove that such extension was given without his consent. — GUDERIAN v. LELAND, Minn., 63 N. W. Rep. 175.

186. PRINCIPAL AND SURETY—Release of Surety—Alteration of Agreement.—When a creditor who holds a collateral security taken from his debtor consents to a material alteration therein, to the predjudice of the surety, the surety is thereby discharged.—MONROE v. DE FOREST, N. J., 31 Atl. Rep. 773.

187. PRINCIPAL AND SURETY — Subrogation.—Where a surety for the payment of a debt receives a security for his indemnity and to discharge such indebtedness, the principal creditor is, in equity, entitled to the full benefit of that security.—SOUTH OMAHA NAT. BANK v. WRIGHT, Neb., 63 N. W. Rep. 126.

188. PROCESS—Service—Corporation.— Process emanating from the Circuit Court against a corporation may be served upon any person appointed pursuant to law to accept service for it; but such service must be in the county in which such person resides, and the return must show this, and state on whom and when the service was, otherwise the service shall not be valid.—FRAZIER v. KANAWHA & M. RY. CO., W. Va., 21 S. E. Rep. 723.

189. RAILROAD COMPANY — Constitution—Damage.— One who acquiesces in the taking and grading for railroad purposes of a city street on which his property abuts waives his right to have his damages paid in advance of the taking.—KAUFMAN v. TACOMA, O. & G. H. R. CO., Wash., 40 Pac. Rep. 137.

190. RAILROAD COMPANY—Injury—Liability of Lessor of Road.—A company owning a railroad is not liable for injuries to an employee of a lessee of the road caused by defects in an engine owned and controlled by the lessee, merely because the lease was made without statutory authority.—BALTIMORE & O. & C. R. CO. v. PAUL, Ind., 40 N. E. Rep. 519.

191. RAILROAD COMPANY—Injury to Stock.—A railroad company, which provided substantial gates in the fence inclosing its right of way, for the convenience of an adjoining landowner, is not liable for the killing of the latter's stock, owing to the gates being left open by a third person.—TEXAS & P. RY. CO. v. GLENN, Tex., 30 S. W. Rep. 845.

192. RAILROAD COMPANIES — Injuries to Person on Track.—The evidence in an action for injuries showed that decedent was struck by a train while he was walking along defendant's railroad track; that the railroad had been located at such place 24 years; and that the public had for a long time used the right of way as a public highway, but it was not shown that such use was with the consent of the defendant or under any claim of right, or that the part of the street covered by the right of way was used by the public as a street prior to the building of the railroad: Held, that a charge to the effect that, if the jury should find that such right of way had been used as a street for 20 years, the decedent had a right to regard it as a public highway, was erroneous.—LOUISVILLE, N. A. & C. RY. CO. v. MILLER, Ind., 40 N. E. Rep. 539.

193. RAILROAD COMPANY—Negligence.—Where a locomotive engineer, without fault on his part, first discovered a defect in the engine after he had commenced his trip, he was not bound to immediately abandon the same, if the defect was not apparently such as to render the engine immediately dangerous, if handled

with great care, and if the risk was not greater, than an ordinarily prudent person would have taken under the same circumstances.—FORDYCE v. EDWARD, Ark., 30 S. W. Rep. 758.

194. RAILROAD COMPANIES — Signals at Crossings.—Section 104, ch. 16, Comp. St., requiring that a bell shall be rung or a steam whistle sounded by a locomotive at a distance of at least 80 rods from the place where a railroad shall cross any other road or street, etc., applies as well to roads in fact used by the public, though not dedicated as public highways, as to those so dedicated. The object of that statute is not merely to protect persons intending to cross the track from collisions, but also to protect all persons lawfully at or near the crossing from any danger naturally to be apprehended from the sudden approach, without warning, of a train at such a place.—CHICAGO, B. & Q. R. CO. v. METCALF, Neb., 63 N. W. Rep. 51.

195. RAILROAD COMPANIES.—In order to charge a railroad company with damages for killing stock straying upon its track, negligence on the part of the company must appear, and the burden of showing it rests upon the plaintiff.—MAYNARD v. NORFOLK & W. R. Co., W. Va., 21 S. E. Rep. 733.

196. RAILROAD COMPANY—Street Railways—Injuries to Child.—Where a child is discovered on the track in front of a moving street car by the servant operating it, or is seen approaching the track with the apparent purpose of crossing, the highest degree of care must be exercised to prevent injury.—SAN ANTONIO ST. RY. CO. v. MECHLER, Tex., 30 S. W. Rep. 899.

197. REAL ESTATE BROKERS — Commissions.—Where, by a contract in regard to the sale of property, a broker arranges with all the parties that his compensation shall be paid in certain stock of a company to be formed by him and others to buy the land, he cannot hold the vendors responsible for the amount of such compensation.—BOWLES v. ALLEN, Va., 21 S. E. Rep. 665.

198. RECEIVER — Appointment.—Where the question is one of disputed title to property, a receiver for the rents and profits will not be appointed on motion of appellant pending an appeal.—CORBIN v. THOMPSON, Ind., 40 N. E. Rep. 533.

199. RECEIVERS — Appointment — Jurisdiction.—The District Court and judges are vested with jurisdiction, by statute, to hear and determine applications for the appointment of receivers in cases then pending in such courts, and also after appeal on the merits to this court.—EASTMAN v. CAIN, Neb., 63 N. W. Rep. 123.

200. RECEIVERS—Selection—Officer of Corporation.—While an officer of a corporation, whose misfortunes have made a receivership necessary, is not ineligible to employment as receiver, yet, where the corporation is one that covers a vast diversity of conflicting interests, and especially of speculation, an officer should not be appointed without careful scrutiny of his official and personal antecedents, and one who is or has been a speculator in the stock of the corporation should never be appointed. — OLMSTEAD v. DISTILLING & CATTLE FEEDING CO., U. S. C. C. (Ill.), 67 Fed. Rep. 24.

201. REFERENCE.—A cause of action, the trial of which will, as disclosed by the complaint, involve an accounting and the adjustment of complicated accounts between parties sustaining fiduciary relations, one to the other, is of equitable cognizance, and the court may order a compulsory reference thereof.—BOND v. WELCOME, Minn., 63 N. W. Rep. 3.

202. REMOVAL OF CAUSES.—Under Act Aug. 13, 1888 (25 Stat. 433, § 2), a cause cannot be removed from a State to a federal court on the ground that it is one arising under the constitution, laws, or treaties of the United States, unless the fact so appears by the plaintiff's statement of his own claim.—CAPLES v. TEXAS & P. RY. CO., U. S. C. C. (Tex.), 67 Fed. Rep. 9.

203. REMOVAL OF CAUSES—Municipal Corporation.—A municipal corporation is a citizen of the State creating it, for the purposes of removal of causes to the federal courts.—CITY OF YSLETA v. CANDA, U. S. C. C. (Tex.), 67 Fed. Rep. 6.

204. REMOVAL OF CAUSES—Right of Intervener to Remove.—An intervener who introduces himself into a pending action in a State court, solely to assist in its defense and to protect himself against a liability for indemnifying the original defendant, can confer no jurisdiction on the federal court that the original defendant could not confer.—OLDS WAGON WORKS v. BENEDICT, U. S. C. C. of App., 67 Fed. Rep. 1.

205. REPLEVIN — Burden of Proof.—In replevin the right of possession must be affirmatively shown to exist in favor of the plaintiff, and plaintiff's right to recover cannot be predicated upon the mere failure of the defendant affirmatively to establish in his own favor a superior right in that respect.—JOHANNSEN v. MILLER, Neb., 63 N. W. Rep. 141.

206. REPLEVIN—Defenses.—The special finding of a jury in replevin that a road supervisor, in performance of his statutory duty, had impounded plaintiff's hogs, which he found running at large on uninclosed lands, giving plaintiff written notice thereof, and that plaintiff had never paid or tendered the costs and expenses of such impounding, was sufficient to sustain a judgment for the defendant.—WILHELM v. SCOTT, Ind., 40 N. E. Rep. 537.

207. REPLEVIN WRIT—Service.—A writ of replevin, made returnable to the county in which the property is detained, may be served in another county, to which the property has been transferred after the beginning of the suit.—CROSIER v. STILLSON, Vt., 31 Atl. Rep. 779.

208. RES JUDICATA.—Defenses which were considered or were admissible in an action of ejectment, and decided against defendant therein, cannot be reconsidered on a bill to restrain an action for mesne profits based on the recovery in ejectment. — MERSHON v. WILLIAMS, N. J., 31 Atl. Rep. 778.

209. RES JUDICATA.—When a judgment or decree has been rendered by a court of competent jurisdiction in a suit, it is a bar to any further action between the same parties upon the same matter of controversy.—BEALE'S ADM'R v. GORDON, Va., 21 S. E. Rep. 667.

210. SALE—Waiver of Warranty.—In an action for the price of a machine warranted to be perfect, it appeared that it was upon delivery found to be defective, and plaintiff's agent promised to remedy the defect, and requested defendant to use it. Defendant used the machine one day, but it was never remedied, and defendant refused to pay for it: Held, that such use of the machine was not an acceptance, nor a waiver of a right to a perfect machine.—AULTMAN, MILLER & CO. v. KNAPP, Mich., 63 N. W. Rep. 66.

211. SPECIFIC PERFORMANCE—Liquidated Damages.—Where a vendee has deposited part of the price as earnest money, to be forfeited as liquidated damages in case he fails to fulfill his contract, and he does fail to fulfill it, a court of equity will enforce the vendor's title to the earnest money, since it is not a penalty, but compensation for the breach of contract.—BUCKLIN v. HASTERLIK, Ill., 40 N. E. Rep. 561.

212. SPECIFIC PERFORMANCE — Sale of Lands—Statute of Frauds.—Allegations, in a complaint for the specific performance of a parol contract for the sale of lands, that the purchaser "went into possession of the same," and that he "immediately entered upon, and cleared up, and put buildings and other valuable improvements upon, said land," do not sufficently show that he took possession under the contract, to take the case out of the statute of frauds.—WAYMIRE v. WAYMIRE, Ind., 40 N. E. Rep. 523.

213. STATUTES—Construction.—Where the title states that the subject of an act is to amend one section of a former statute, the act cannot be extended to the amendment of other sections.—EX PARTE HEWLETT, Nev., 40 Pac. Rep. 96.

214. STATUTES — Power to Issue Bonds.—Statutes which authorize the issuance of bonds by the minor political subdivisions of the State are subjects for strict construction when an interpretation is necessary; and where from a careful study and analysis of the whole act and its several parts, the meaning and intent is doubtful, the doubt should be resolved in favor of the public taxpayers.—STATE v. MOORE, Neb., 63 N. W. Rep. 180.

215. TAXATION — Advertised List.—An advertised tax list, which gives the correct number of the special assessment warrant under which the delinquent assessments were levied, but which states its date incorrectly, is sufficient to support an application for judgment therefor, where the objector is not misled thereby.—YOUNG v. PEOPLE, Ill., 40 N. E. Rep. 604.

216. TAXATION—County.—Const. art. 7, § 8, providing that, whenever the expenses of any fiscal year shall exceed the income, the legislature may provide for a tax for the ensuing year sufficient to pay the deficiency, as well as the estimated expenses of the ensuing year, applies only to State taxes.—MASON v. PURDY, Wash., 40 Pac. Rep. 130.

217. TAXATION — Delinquent School Taxes.—An objection to an application for judgment for delinquent school taxes, that the assessment was "for school purposes only, the said sum being in excess of the amount by law authorized to be raised and assessed," does not raise the point that the certificate for the tax is void because it fails to state how much of the money was required for school purposes, and how much for building purposes.—CHICAGO & A. R. CO. v. PEOPLE, Ill., 40 N. E. Rep. 602.

218. TAXATION — Personal Property.—"The personal property pertaining to the business of a merchant shall be listed in the town or district where his business is carried on." Gen. St. 1894, § 1516: Held, that the place where the business is carried on, within the meaning of this statute, is the place where the property is kept for sale. The mere buying of property in some town or district other than that of his residence would not render it assessable at the place of purchase.—MINNEAPOLIS & N. ELEVATOR CO. v. BOARD OF COM'RS OF CLAY COUNTY, Minn., 63 N. W. Rep. 101.

219. TAXATION — Recovery of Taxes Paid — Duress.—Taxes under a special assessment paid, under protest and an expressed intention to sue to recover it back, before the penalty for non payment became due, there being no actual seizure or immediate danger of actual seizure of the property, cannot be recovered back in an action of *assumpsit*, on the ground that the payment was compulsory.—HOPKINS v. CITY OF BUTTE, Mont., 40 Pac. Rep. 171.

220. TELEGRAPH COMPANY—Delay—Variance.—Where the petition alleged a contract by defendant telegraph company to transmit and deliver a telegram to plaintiff, proof that the contract was made with another company, which sent it to defendant to be forwarded, paying the latter one-half the sum collected therefor, was not such a variance as would prevent recovery for delay in delivery.—WESTERN UNION TEL. CO. v. SMITH, Tex., 30 S. W. Rep. 937.

221. TELEGRAPH COMPANY— Damages.— The person for whose benefit a telegraph message is sent, and who is named therein, or of whose interest the company has notice at the time, may sue for injury resulting from a failure to deliver the same. —WESTERN UNION TEL. CO. v. COFFIN, Tex., 30 S. W. Rep. 896.

222. TRESPASS—Removing Timber. — One who sold standing timber of a certain description upon a tract of land, the purchaser having died before he severed the timber and removed it, is not concerned with the question whether persons authorized by the administrator of the purchaser to cut and appropriate the timber did so as legal purchasers from the administrator, or only as his licensees. Relatively to the vendor of the timber they stand as the administrator himself would have stood had he, in behalf of the estate which he represented, done the work in person or by his servants or employees.—MORGAN v. PERKINS, Ga., 21 S. E. Rep. 574.

223. TRESPASS ON LAND.—Where a complaint alleges a continuing trespass by defendant, through its agents, on plaintiff's land, and the cutting and conversion of timber growing thereon, in a single count, the entire cause of action is local, and only a federal court within the State in which the land lies has jurisdiction.—ELLENWOOD v. MARIETTA CHAIR CO., U. S. S. C., 15 S. C. Rep. 771.

224. TRESPASS TO TRY TITLE. —Where, in trespass to try title, plaintiff claimed through the beneficiaries in a trust deed a deed from the heirs of the trustee to defendant does not show a common source of title between plaintiff and defendant, estates in trust not descending to heirs upon the death of the trustee.—PASCHAL v. EVANS, Tex., 30 S. W. Rep. 923.

225. TRUST—Payment for Land.—One who buys land with the money of another holds it in trust for the lender, to the extent of the sum borrowed, without any express agreement.—HOLDEN v. STRICKLAND, N. Car., 14 S. E. Rep. 604.

226. TRUST AND TRUSTEE—Compensation of Counsel. —Trustees, who in good faith engaged counsel to aid in the execution of their trust, are entitled to pay them out of the trust fund.—COCHRAN v. RICHMOND & A. R. CO., Va., 21 S. E. Rep. 664.

227. WATERS— Irrigation — Appropriations.—In 1885 appellants acquired priorities to an irrigating ditch. There was a second appropriation, by enlargement, in 1887. In the interim, water rights of others intervened. At the time of the first appropriation the appellants filed no plat or declaration of intention to appropriate a further quantity, nor was the construction of the enlargement prosecuted within a reasonable time: Held, the rights of the appellants to the second appropriation by enlargement are inferior to those whose rights attached in the interim.—TAUGHENBAUGH v. CLARK, Colo., 40 Pac. Rep. 153.

228. WATERS—Surface Waters—Measure of Damages. —In an action against a railroad for injuries to land, caused by its negligence in constructing drains across its roadbed so as to cause surface water to back on plaintiff's land, the measure of damages, where the injuries are permanent, is the difference in the value of the land before and after the injury.—LOUISVILLE, N. A. & C. RY. CO. v. SPARKS, Ind., 40 N. E. Rep. 546.

229. WILLS—Attestation.—The wife of a legatee under a will is a "credible witness" thereto, within Rev. St. art. 4859, providing that every will shall be attested by at least two credible witnesses, and her attestation will not invalidate the bequest to the husband.—GAMBLE v. BUTCHER, Tex., 30 S. W. Rep. 861.

230. WILL—Devise of Life Estate to Husband.—A will by a wife, giving her husband the use of all her realty during his life, with power to sell all or any part of it, if necessary for his support, and directing that whatever part of such realty remained unsold at his death should descend to her heirs in "proportion as the same would descend to them if this will had not been made," vested in the husband only a life estate.—RAWLEY v. SANNS, Ind., 40 N. E. Rep. 674.

231. WILL — Devise on Condition.—Under a will devising the residuary estate "on the condition and *proviso*" that the devisee, within a certain time, pay certain legacies, which are made a charge on the land, the *proviso* will be treated as a covenant, if no forfeiture is expressly provided for and no disposition of the estate is made in case the devisee fails to pay the legacies within the prescribed time, and therefore his failure to pay does not forfeit his estate.—CUNNINGHAM v. PARKER, N. Y., 40 N. E. Rep. 635.